(20)

No. 00-1770-CFX
Status: GRANTED

Title: Department of Housing and Urban Development, Petitioner
v.
Pearlie Rucker, et al.

Docketed:
May 24, 2001

Court: United States Court of Appeals for the Ninth Circuit

Vide:
00-1781

Counsel for petitioner: Solicitor General

Counsel for respondent: Renne,Paul, Simpich,William M., Omura,Anne Tamiko, Jacobowitz,Ira, Murcko,John, Salinas,Robert, Hall,Randolph, Lafayette,Gary T., Schlosser,Alan J., Anders,Gideon, Rothchild,Richard, Schur,Dara Lynn, Gardner,Debra, Rothchild,Toby, Jacobs,Ilene

Entry	Date	Note	Proceedings and Orders
1	Apr 10 2001	G	Application (00A890) to extend the time to file a petition for a writ of certiorari from April 24, 2001 to May 24, 2001, submitted to Justice O'Connor.
2	Apr 11 2001		Application (00A890) granted by Justice O'Connor extending the time to file until May 24, 2001.
3	May 24 2001	G	Petition for writ of certiorari filed. (Response due July 23, 2001)
4	May 24 2001		Appendix of petitioner filed.
6	Jun 15 2001		Order extending time to file response to petition until July 23, 2001.
7	Jun 22 2001	G	Motion of Housing and Development Law Institute, et al. for leave to file a brief as amici curiae filed.
8	Jul 23 2001		Brief of respondents Pearlie Rucker, et al. in opposition filed. VIDED.
9	Aug 8 2001		DISTRIBUTED. September 24, 2001 (Page 103)
10	Aug 9 2001	X	Reply brief of petitioner Department of Housing and Urban Development filed.
11	Sep 25 2001		Motion of Housing and Development Law Institute, et al. for leave to file a brief as amici curiae GRANTED. Justice Breyer OUT.
12	Sep 25 2001		Petition GRANTED. Justice Breyer OUT. SET FOR ARGUMENT February 19, 2002.
			**********
14	Nov 9 2001		Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.
13	Nov 13 2001		Order extending time to file the joint appendix and petitioner's brief on the merits to and including November 20, 2001.
15	Nov 20 2001		Joint appendix filed. VIDED.
16	Nov 20 2001		Brief amici curiae of Council of Large Public Housing Authority, et al. filed.
17	Nov 20 2001		Brief of petitioner Department of Housing and Urban Development filed. VIDED.
18	Dec 14 2001		CIRCULATED.
19	Dec 20 2001	X	Brief amici curiae of AARP, et al. filed. VIDED.
20	Dec 20 2001	X	Brief of respondents Pearlie Rucker, et al. filed. VIDED.

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Entry	Date	Note	Proceedings and Orders
21	Dec 20 2001	X	Brief amici curiae of Lawrence Lessig, et al. filed. VIDED.
22	Dec 20 2001	X	Brief amici curiae of National Network to End Domestic Violence, et al. filed. VIDED.
24	Dec 20 2001	X	Brief amici curiae of Coalition to Protect Public Housing, et al. filed. VIDED.
25	Dec 20 2001	X	Brief amicus curiae of Center for the Community Interest filed.
26	Dec 20 2001	X	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
28	Dec 20 2001	X	Brief amici curiae of Pennsylvania Association of Resident Councils, et al. filed. VIDED.
23	Jan 4 2002	G	Motion of the Solicitor General for divided argument filed.
27	Jan 22 2002		Motion of the Solicitor General for divided argument GRANTED. Justice Breyer OUT.
29	Jan 25 2002	X	Reply brief of petitioner United States Department of Housing and Urban Development filed. VIDED.
30	Jan 25 2002	X	Reply brief of petitioners Oakland Housing Authority, et al. filed. VIDED.
31	Feb 12 2002		Record filed.
		*	Record proceedings from the U.S.C.A. 9th Circuit (1 envelope).
32	Feb 19 2002		ARGUED.

Supreme Court, U.S.
FILED

001770 MAY 24 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1437d(*l*)(6) of Title 42 of the United States Code (Supp. IV 1998) provides that public housing leases must contain a clause stating that "any drug-related criminal activity on or off [the] premises engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."

The question presented is:

Whether the lease clause provided for in 42 U.S.C. 1437d(*l*)(6) (Supp. IV 1998) is violated by such drug-related criminal activity, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug activity.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties in the court of appeals were Herman Walker, Willie Lee, Barbara Hill, Harold Davis, and the Oakland Housing Authority.

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No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States Department of Housing and Urban Development, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of en banc court of appeals (Pet. App. 1a-67a) is reported at 237 F.3d 1113. The order of the court of appeals (Pet. App. 68a-69a) providing for rehearing en banc is reported at 222 F.3d 614. The opinion of the panel of the court of appeals (Pet. App. 70a-137a) is reported at 203 F.3d 627. The opinion of the district court (Pet. App. 138a-166a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. On April 11, 2001, Justice O'Connor extended the time for filing a petition for a writ of

certiorari to and including May 24, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Housing Act of 1937, 42 U.S.C. 1437d(*l*) (Supp. IV 1998), and regulations of the Department of Housing and Urban Development are set forth at Pet. App. 167a-172a.

STATEMENT

This case concerns the meaning of a clause that a federal statute requires each public housing authority (PHA) to include in leases of public housing units that receive federal housing assistance. The clause provides that drug-related criminal activity by specified individuals is a ground for eviction. The Oakland Housing Authority (OHA) instituted eviction proceedings against four tenants pursuant to that clause. The tenants instituted this action in the United States District Court for the Northern District of California to obtain an injunction against their eviction. The district court granted them a preliminary injunction, but a panel of the court of appeals reversed. On rehearing en banc, the court of appeals affirmed the district court's decision.

1. The United States Housing Act of 1937 (Housing Act), 42 U.S.C. 1437 *et seq.*, authorizes the Secretary of Housing and Urban Development (HUD) to make loans or loan commitments to public housing agencies to help finance the development, acquisition, or operation of low-income housing projects by such agencies. 42 U.S.C. 1437b(a).

In 1988 and 1990, Congress amended the Housing Act in an effort to keep drug-related activity out of

public housing. Congress made the following findings:

> (1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;
>
> (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial governmental expenditures;
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities.

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. 11901 (1994 & Supp. IV 1998)).[1] In light of those findings, Congress also mandated in 1988 that "[e]ach public housing

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[1] The words "or violent" were inserted after "drug-related" in paragraphs (2) and (4) by Pub. L. No. 105-276, §§ 586(b)(1) and (2)(A), 112 Stat. 2646. Additional findings were added by Section 586(b)(2)(B) of that Public Law.

agency shall utilize leases which" provide that

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

Anti-Drug Abuse Act of 1988, § 5101, 102 Stat. 4300. That provision was amended in 1990 to require that public housing leases

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4185 (codified at 42 U.S.C. 1437d(*l*)(5) (1994)). The provision was again amended in 1996 by changing the phrase "on or near such premises" to "on or off such premises." Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836. It is now codified at 42 U.S.C. 1437d(*l*)(6) (Supp. IV 1998).[2] See also 42 U.S.C. 1437d(*l*) (1994 & Supp. IV 1998) (defining "drug-related criminal activity" to mean "the illegal manufacture, sale, distribution, use, or possession with

[2] The provision was redesignated from paragraph (5) to paragraph (6) of Section 1437d(*l*) by Pub. L. No. 105-276, § 512(b)(1), 112 Stat. 2543.

intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in [21 U.S.C. 802]").

HUD's regulation establishing mandatory lease terms for public housing tenants, which was promulgated before the 1996 amendment that changed "on or near" to "on or off," closely tracks the statutory language. The regulation requires leases to impose an obligation on the tenant:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. 966.4(f)(12)(i).

In issuing its regulation, HUD explained that permitting the landlord to evict a tenant for breach of lease obligations is a "normal and ordinary incident of tenancy," and that permitting eviction based on the behavior of household members gives the tenant and other household members "a strong motive to avoid behavior which can lead to eviction." 56 Fed. Reg. 51,560, 51,566 (1991). In light of Congress's determination that drug crimes "are a special danger to the security * * * of public housing residents," *id.* at 51,566-51,567, HUD considered it appropriate that the

"tenant should not be excused from contractual responsibility by arguing that [the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit," *id.* at 51,567.

HUD's regulations do not require public housing authorities to evict the tenant in every instance of a violation of the lease provisions. Instead, the regulations provide that "[i]n deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. 966.4(*l*)(5)(i).

2. In late 1997 and early 1998, OHA instituted eviction proceedings in state court against the four public housing tenants who are plaintiffs in this case—Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker. In each case, OHA alleged that the tenant had violated paragraph 9(m) of his or her lease, a provision that implements Section 1437d(*l*)(6) and that obligates the tenant to "assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premises." Pet. App. 5a-6a.

Pearlie Rucker is a 63-year-old woman who has lived in public housing since 1985. OHA's complaint alleged that her daughter, who resides with her, was found with cocaine and a crack cocaine pipe three blocks from Rucker's apartment. OHA subsequently sought and obtained a dismissal of the complaint without prejudice in February 1998. Pet. App. 6a; *id.* at 141a.

Willie Lee is 71 years old and has lived in public housing for more than 25 years. OHA's complaint alleged that Lee's grandson, who resides with her, was caught smoking marijuana in the apartment complex parking lot. Pet. App. 6a; see also Gov't C.A. E.R. 7.

Barbara Hill is 63 years old and has lived in public housing for more than 30 years. OHA's complaint alleged that Hill's grandson, who resides with her, was caught with Lee's grandson in the apartment complex parking lot and admitted smoking marijuana. Pet. App. 6a; see also Gov't C.A. E.R. 8.

Herman Walker is a disabled 75-year-old man who has lived in public housing for ten years. He requires an in-home caregiver. OHA's complaint alleged that on three instances within a two-month period, Walker's caregiver and two others were found with cocaine in Walker's apartment. Each time, Walker was issued a lease violation notice. After OHA instituted the action to evict Walker, Walker fired his caregiver. Pet. App. 6a.

3. Following the institution of eviction proceedings against them in state court, the four tenants commenced this action in the United States District Court for the Northern District of California. They sought, *inter alia*, a preliminary and permanent injunction that would prohibit OHA from evicting any tenants without proof "that a tenant personally participated in, had prior knowledge of, and the actual ability to prevent criminal activity on the premises." Gov't C.A. E.R. 14.

The district court determined that neither Section 1437d(*l*)(6) itself nor its legislative history "addressed the question of whether a housing authority may terminate the lease of an 'innocent' tenant," Pet. App. 147a, see also *id.* at 148a, which the court defined as a tenant who is "innocent of the drug-related criminal activity which is the cause of the lease termination and * * * also innocent of any knowledge of the drug-

related criminal activity," *id.* at 141a. The court then considered whether HUD's interpretation of the statute to authorize eviction in such circumstances rests on a permissible construction of the statute, to which the courts must defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 151a. The court adverted in that regard to 42 U.S.C. 1437d(*l*)(1), which prohibits public housing authorities from using leases that "contain 'unreasonable terms and conditions.'" Pet. App. 151a (quoting 42 U.S.C. 1437d(*l*)(1)). The court concluded that the tenants had "shown, at a minimum, the existence of serious questions and a fair chance of success with respect * * * to whether OHA's termination of a tenant's lease for a household member's drug-related criminal activity outside of the tenant's unit is unreasonable within the meaning of 42 U.S.C. § 1437d(*l*)(1) when the tenant had no knowledge of, and no reason to know of, the activity." *Id.* at 160a. The court further expressed the view that eviction in those circumstances would be "irrational" and for that reason unconstitutional. *Id.* at 160a-162a.

The court also addressed claims by Rucker and Walker that evicting them would violate the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (ADA). The court held that "[p]laintiffs may not state a claim under the ADA against HUD as the ADA does not apply to actions taken by the federal government." Pet. App. 153a. The court, however, permitted Walker's ADA claim—but not Rucker's[3]—to proceed against the Oakland defendants. *Id.* at 156a-157a. The tenants did not appeal the district court's ruling that

[3] The district court rejected Rucker's ADA claim on the ground that she does not allege that she is disabled. Pet. App. 155a.

HUD was not subject to an ADA claim. As a result, no ADA claim is before the Court on this certiorari petition filed by HUD.

The court issued a preliminary injunction prohibiting OHA "from terminating the leases of tenants * * * for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, and had no reason to know of, the drug-related criminal activity." Pet. App. 165a-166a. The injunction was not limited merely to the four tenants who had brought the case, but broadly applied to all "leases of tenants." *Id.* at 165a. The court also enjoined OHA from prosecuting any of the three eviction actions that remained pending in state court after the *Rucker* action was dismissed. *Id.* at 166a. The court noted, however, that OHA "is not preliminarily enjoined from evicting tenants * * * for drug-related criminal activity in the tenant's apartment, regardless of whether the tenant knew, or had reason to know, of the criminal activity," except for Walker, the validity of whose eviction, the court concluded, would turn on the ADA. *Ibid.*; see also *id.* at 163a.

4. A divided panel of the Ninth Circuit reversed the district court's decision and vacated the preliminary injunction. Pet. App. 68a-137a. The majority "concluded that the plain language of 42 U.S.C. § 1437d(*l*)(5), considered both by itself and in light of the broader statutory context, makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity." *Id.* at 107a. Judge William Fletcher dissented. *Id.* at 115a-137a.

5. a. The court of appeals ordered rehearing en banc. Pet. App. 69a. By a 7-4 vote, the en banc court affirmed the district court's entry of a preliminary injunction.

Id. at 1a-67a. The court noted that the issue before it was whether "the district court * * * based its decision on an erroneous legal interpretation" of Section 1437d(*l*)(6), "thereby abusing its discretion." *Id.* at 10a. The court stated therefore that it would address "the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo." *Ibid.* The court held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." *Id.* at 26a. Rejecting HUD's interpretation of the statute, under which the tenant is not "excused from contractual responsibility by arguing that [the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit," 56 Fed. Reg. at 51,567, the court concluded that "Congress had an intention on the precise question at issue that is contrary to HUD's construction," and that therefore "HUD's interpretation is not entitled to deference" under *Chevron*. Pet. App. 11a.

The court first examined the text of Section 1437d(*l*)(6). The court concluded that the statutory language "does not compel either party's interpretation" because it "does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted." Pet. App. 12a. The court was of the view, however, that construing the statute to permit eviction of tenants who are not shown to have known of the drug-related activity would be "irrational" and "thus would require PHAs to include an unreasonable term in their leases," in violation of Section 1437d(*l*)(1). *Id.* at 15a. In particular, the court stated, permitting such evictions "could not have a

deterrent effect because the tenant would have already done all that tenant could do to prevent the third-party drug activity." *Id.* at 14a.

The court also believed that a separate statutory provision supported its interpretation. The court noted that in 1988, when Congress first enacted what is now Section 1437d(*l*)(6), Congress also amended a pre-existing civil forfeiture provision in 21 U.S.C. 881(a)(7) (1982 ed. Supp. V 1987) specifically to include leasehold interests among the property that was subject to forfeiture because it was used to commit or facilitate a drug-related offense. See Anti-Drug Abuse Act of 1988, § 5105, 102 Stat. 4301. At the time of the amendment, that provision already contained an "innocent owner" defense that precluded forfeiture "by reason of any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. 881(a)(7) (1982 ed. Supp. V 1987).[4] The court "presume[d] Congress meant [the forfeiture provision and Section 1437d(*l*)(6)] to be read consistently." Pet. App. 17a.

The court also relied on the legislative history of the 1990 amendment to Section 1437d(*l*)(6). The committee report on the Senate version of the bill stated:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests

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[4] This provision has now been replaced by a general "innocent owner" defense to civil forfeiture. See Pub. L. No. 106-185, § 2(a), 114 Stat. 202, to be codified at 18 U.S.C. 983(d). See Pet. App. 16a n.1.

or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990). The report also stated, in describing a parallel provision in the same bill concerning the Section 8 housing program, that "the Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t." *Id.* at 127. Rejecting HUD's argument that the report simply "indicates Congress's intent to confer wide discretion on HUD and the local PHAs," Pet. App. 20a, the court held that the "reports are very clear that such evictions *would not* be appropriate, and that in such circumstances good cause to evict *would not* exist." *Id.* at 21a. Accordingly, the court "reject[ed] HUD's interpretation as contrary to the clearly expressed intent of Congress." *Ibid.*

The court added that HUD's interpretation of the statute should be rejected because it would, in the court's view, lead to "absurd results." Pet. App. 21a. The court stated that "there was nothing more Pearlie Rucker could have done to protect herself from eviction"; that "the statute would * * * permit eviction * * * if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana"; and that "the provision would * * * authorize eviction if a household member had been convicted of a drug crime years earlier." *Id.* at 22a.

Finally, the court concluded that the principle of constitutional avoidance supported its result, because "[p]enalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause." Pet. App. 24a. The court distinguished *Bennis* v. *Michigan*, 516 U.S. 442 (1996), which permitted forfeiture of a wife's interest in a car because of her husband's use of the car to engage in sexual activities with a prostitute, conduct of which the wife was unaware. The court's primary distinction of *Bennis* was that the property in *Bennis* had been "used in criminal activity," while the leasehold interests here (with the exception of Walker's apartment) had not been. Pet. App. 25a.

The court affirmed the district court's grant of a preliminary injunction. In addition, without discussing any issues concerning the allocation of the burden-of-proof, the court stated that "OHA remains free to proceed with evictions for off-premises drug activities when *it can prove* the tenant knew or should have known of the activity." Pet. App. 28a (emphasis added); see also *id.* at 29a & n.10.

b. Judge Sneed, joined by three other judges, dissented. Pet. App. 32a-67a. In his view, "[b]ecause the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute." *Id.* at 33a. But he noted as well that "whether one accepts our contention that the statutory language is clear or the majority's argument that the language is silent, application of the *Chevron* test to the present controversy leads to the same conclusion." *Id.* at 33a-34a.

Judge Sneed noted that the text of Section 1437d(*l*)(6) authorizes eviction when "a 'public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control' engages in 'any drug related criminal activity.'" Pet. App. 35a. He explained that "[t]he majority's reading of the statute requires that the drug user fall into two of the categories—a drug user must be both a household member/guest *and* under the tenant's control"—a read-

ing that "renders the enumerated categories (tenants, household members, guests) superfluous." *Id.* at 37a.

Judge Sneed also believed that other statutory provisions supported HUD's construction of the statute. In his view, for example, the fact that Congress included express "innocent owner" language in the forfeiture statute merely underscores the significance of Congress's omission of any similar language in Section 1437d(*l*)(6). Pet. App. 42a-44a. See also *id.* at 40a-42a (discussing 42 U.S.C. 1437d(c)(4)(A) (1994)).

Judge Sneed disputed the majority's contention that Section 1437d(*l*)(1) would impose an "unreasonable" lease term if it permitted eviction of tenants who were ignorant of the drug-related conduct. He explained that "[t]he ignorant tenant eviction provision rationally addresses" Congress's concerns about the serious problems caused by drug crimes in public housing projects, because it gives the public housing authority "a credible deterrent against criminal activity" and because "requir[ing] proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical" in any case in which the tenant was not himself found in the presence of the offender during the drug-related criminal activity. Pet. App. 51a. He also noted that the provision empowers other tenants to report drug-related activity, and thereby help clean up their own projects, "without fearing the possibility of retaliation" from drug dealers. *Id.* at 53a. He added that "a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants" and that fact "attests to [its] reasonableness." *Id.* at 54a.

Finally, Judge Sneed concluded that Section 1437d(*l*)(6), without an "ignorant owner" exception, is constitutional. He explained that "[t]he failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny," especially in light of the fact that "Congress must draw distinctions 'in order to make allocations from a finite pool of resources.'" Pet. App. 60a (quoting *Lyng* v. *International Union, United Auto Workers of Am.*, 485 U.S. 360, 373 (1988)). In Section 1437d(*l*)(6), he continued, "Congress has limited the right to reside in public housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests." *Id.* at 58a. The provision thus "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." *Id.* at 61a. And "[b]ecause the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction." *Ibid.* For those reasons, Judge Sneed concluded, the statute is constitutional.

REASONS FOR GRANTING THE PETITION

As the court of appeals itself recognized, "[m]any of our nation's poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children." Pet. App. 2a. In an effort to end what Congress termed the "reign of terror" imposed by drug dealers on public housing tenants, 42 U.S.C. 11901 (1994 & Supp. IV 1998), Congress enacted Section 1437d(*l*)(6) in 1988 and strengthened it in 1990 and 1996. The decision of the court of appeals drains much of the

meaning and significance from that statute and the implementing regulation issued by HUD. The result is to deprive public housing authorities of an important tool to achieve safe and liveable public housing, and to deprive public housing tenants of protection that Congress found to be of central importance for their security and well-being.

Most cases construing Section 1437d(*l*)(6) arise in state, not federal, court, because issues concerning its application typically arise in eviction cases brought in state court. There is division in the state courts as to whether Section 1437d(*l*)(6) authorizes eviction regardless of the tenant's knowledge of criminal conduct by persons specified in the statute, although most state courts have agreed with HUD's position that the statute does not contain an exception for situations involving lack of knowledge. Moreover, the Ninth Circuit's decision conflicts with the interpretation of the statute by the Supreme Court of Tennessee, which determined that "both the language of [the applicable] lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity." *Memphis Hous. Auth.* v. *Thompson*, 38 S.W.3d 504, 512 (2001). The Ninth Circuit's decision also conflicts with the decision of the Minnesota Supreme Court in *Minneapolis Public Housing Authority* v. *Lor*, 591 N.W.2d 700 (1999), which held that Section 1437d(*l*)(6) and the implementing HUD regulation authorize a public housing authority to terminate a lease based on the criminal conduct of a household member even when the tenant does not have knowledge of the conduct.

In addition, the Ninth Circuit's decision is at odds with core principles of administrative law recognized by

this Court, since the court of appeals' decision rested on its own conclusions about the best interpretation of Section 1437d(*l*)(6), rather than deference to HUD's considered view that that provision does not admit of an "ignorant owner" or "innocent owner" exception. And because the en banc court's decision rests on its *de novo* construction of the statute, it will not be open to modification in any further proceedings on remand. The court's decision therefore will govern all public housing authorities in a large geographic area of the country. Accordingly, review by this Court of the important and recurring issue presented is warranted.

1. The Ninth Circuit held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." Pet. App. 26a. Indeed, the court's decision could be read to have concluded that the burden of proof with respect to whether a tenant had "a lack of knowledge or other reason" for failure to control the drug-related activity rests with the public housing authority. See *id.* at 28a ("OHA remains free to proceed with evictions for off-premises drug activities when it can prove the tenant knew or should have known of the activity."); *id.* at 29a & n.10; compare *id.* at 51a-54a (Sneed, J., dissenting).[5]

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[5] The court of appeals noted that the district court did not enjoin OHA from pursuing evictions of tenants "when the drug-related activity occurs within the tenant's apartment, creating a rebuttable presumption that [the] tenant controls what occurs in his or her unit." Pet. App. 28a-29a. In fact, the reference in the district court's opinion to a "rebuttable" presumption in those circumstances was to what the plaintiff tenants argued, not what the district court's decision held. See *id.* at 162a. Of course,

Thus, eviction would depend on difficult questions of proof as to whether the tenant knew of the drug-related activity and, perhaps, whether the tenant had the ability to control it.[6]

The Ninth Circuit's interpretation of Section 1437d(*l*)(6) essentially neutralizes an important tool that Congress designed to assist in ridding public housing of the scourge of drug-related criminal activity. Aside from the rare case in which the tenant is caught in the immediate presence of a household member or guest using or trafficking in drugs, the showing required by the Ninth Circuit (especially if, as the Ninth Circuit appeared to suggest, the burden of proof is on the housing authority) will be an insuperable obstacle to eviction. In most cases, a tenant threatened with eviction is likely to deny any knowledge of or ability to control drug-related criminal activity. Moreover, the household member or guest engaged in the drug-related activity is likely (if he does not invoke his Fifth Amendment privilege) to confirm the tenant's denials.

The housing authority typically will have little ability to contest the tenant's denial of knowledge or control. Proving the knowledge of those who directly partici-

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imposition of such a rebuttable of presumption of control, even when drug-related criminal activity occurs in the unit itself, would undermine the important purposes underlying Section 1437d(*l*)(6).

[6] The court's test appears to rest ultimately on whether the tenant could control the household member or guest. See Pet. App. 26a. But in another portion of its opinion, the court stated that "[t]he district court's injunction does not address the issue of whether tenants who have knowledge of off-premises drug activities by household members may be evicted if they attempt in good faith to prevent their household members from engaging in such activity, but are unable to do so. Accordingly, we do not consider that question here." *Id.* at 28a n.9.

pate in criminal activity is difficult even for prosecutors who are armed with standard prosecutorial tools: the grand jury's subpoena power, the ability to induce co-conspirators to cooperate, and even the ability to conduct wiretaps and use other similar investigative techniques when appropriate. Under the Ninth Circuit's standard, however, public housing authorities, who have none of those tools available, apparently must prove the knowledge of tenants who are not necessarily direct participants in the criminal activity at all. Section 1437d(*l*)(6) was formulated to deal with that problem by enabling housing authorities to maintain the security of public housing projects by removing tenants who allow drug criminals into their units. The Ninth Circuit's decision substantially undermines the ability of public housing authorities to use Section 1437d(*l*)(6) to achieve that goal, and to do so as swiftly as possible.

Of course, the fact that the clause permits PHAs to evict tenants who violate it does not mean that it *requires* PHAs to do so in all circumstances. To the contrary, HUD regulations provide that "[i]n deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. 966.4(*l*)(5)(i). In this very case, OHA voluntarily ceased its effort to evict tenant Rucker, presumably based on a consideration of the factors enumerated by HUD. As Judge Sneed recognized, leaving discretion with the public housing authority makes sense, both because it gives tenants an incentive "to accept remedial actions short of eviction," Pet. App. 61a, and because the local

public housing authority is in the best position to assess the seriousness of a drug problem at a given project and the contribution to that problem made by a particular tenant, other household members, and other persons connected with the unit. Under the Ninth Circuit's decision, however, that discretion is largely nullified.

2. The Ninth Circuit's construction of Section 1437d(*l*)(6) conflicts with the interpretation of the same statute by the Tennessee Supreme Court in *Memphis Housing Authority* v. *Thompson*, *supra*. In that case, the court reviewed the conflicting decisions from lower courts addressing the meaning of Section 1437d(*l*)(6), including the Ninth Circuit's en banc decision in this case. See 38 S.W.3d at 509-511. The court noted that the statute, and the lease provisions that were derived from the statute, "refer to four separate categories of people: (1) the resident * * *; (2) household members; and (3) guests or (4) other persons under the resident's control." *Id.* at 511-512. It then concluded that "both the language of this lease, and the federal statute from which it is derived, *clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity*." *Id.* at 512 (emphasis added). By contrast, the Court concluded that "the language is not clear with respect to the standard that applies to a guest or other person under the resident's control." *Ibid.* In those situations, the court held that the statute and lease provision "permit[] eviction only if [the housing authority] establishes that [the tenant] knew or should have known of the drug-related criminal activity 'of a guest or other person' and failed to take reasonable steps to prevent or halt it." *Id.* at 513.

The Supreme Court of Tennessee thus explicitly disagreed with the Ninth Circuit that knowledge must be shown in cases in which the eviction is based on conduct

of household members—as it was in the case of the three tenants (Rucker, Lee, and Hill) whose claims are the focus of this petition.[7] Although the Supreme Court of Tennessee in *Thompson* agreed with the Ninth Circuit's approach when Section 1437d(*l*)(6) is applied to drug-related activity by guests or other persons under the tenant's control—*i.e.*, *non*-household members—none of the three tenants whose claims are at issue here was threatened with eviction based on conduct of a non-household-member.[8] Accordingly, there is an explicit disagreement between the Ninth Circuit and the Supreme Court of Tennessee with respect to each of the claims at issue in this petition.

It is true that *Thompson* itself arose from an attempted eviction based on the conduct of a guest of a tenant—unlike this case, which arose from attempted evictions based on the drug-related conduct of house-

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[7] Three instances of drug-related criminal activity occurred in Walker's apartment. Therefore, in the absence of Walker's ADA claim, even the Ninth Circuit would have held that knowledge could be presumed and he could be evicted under Section 1437d(*l*)(6). See Pet. App. 29a. Based on the district court's unappealed ruling that HUD may not be sued under the ADA, however, HUD is no longer a defendant with respect to Walker's ADA claim. See p. 8, *supra*. Accordingly, we do not challenge in this petition the court of appeals' ruling or the district court's injunction against OHA insofar as it concerns Walker's ADA claim.

[8] In our view, the court in *Thompson* erred in holding that the tenant's knowledge or control must be shown where the eviction is based on drug-related criminal activity by a "guest or other person." The statutory term "control" simply "means that the tenant 'controls' who has access to the premises" and it "in no way implies that the tenant knew or should have known of the drug activity." *Housing Auth.* v. *Green*, 657 So. 2d 552, 554 (La. Ct. App.), writ denied, 661 So. 2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996).

hold members. But the Supreme Court of Tennessee was unequivocal in its interpretation of Section 1437d(*l*)(6), stating that "we hold that the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member." 38 S.W.3d at 505. Regardless of whether the court's statement thus amounts to a square holding in light of the particular facts of *Thompson*, it is at least true that the Supreme Court of Tennessee has definitively spoken to the question of the meaning of Section 1437d(*l*)(6), and that ruling would have resulted in a decision reversing the district court in this case.[9]

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[9] Most other courts that have addressed the issue likewise have held that eviction does not depend on the tenant's knowledge of the criminal activity, without distinguishing (as the Tennessee Supreme Court did) between members of the household and guests or other persons under the tenant's control. The cases typically have involved drug-related activities in the tenant's apartment. See, *e.g.*, *City of South San Francisco Hous. Auth.* v. *Guillory*, 49 Cal. Rptr. 2d 367, 371-372 (App. Dep't Super. Ct. 1995) (eviction permissible without showing of tenant's knowledge); *Housing Auth.* v. *Green*, 657 So. 2d at 554 ("[W]hen the Congress * * * enacted this law it did so without the imposition of a knowledge requirement."); *Ann Arbor Hous. Comm'n* v. *Wells*, 618 N.W.2d 43, 45 (Mich. Ct. App. 2000) ("[W]e hold that a public housing tenancy may be terminated under [Section 1437d(*l*)(6)] regardless of whether the tenant had knowledge of the drug-related activity conducted on or off the premises by the tenant, a member of the tenant's household, or a guest or another person under the tenant's control."); *Willock* v. *Schenectady Mun. Hous. Auth.*, 706 N.Y.S.2d 503, 505 (App. Div. 2000) (permitting eviction "regardless of knowledge or fault on the part of the tenant"); *Syracuse Hous. Auth.* v. *Boule*, 701 N.Y.S.2d 541, 541 (App. Div. 1999) ("We reject the contention of respondent that, because she was not aware of the drug-related criminal activity and did not consent to it, good cause did not exist for her eviction."). But see *Delaware County Hous. Auth.* v. *Bishop*, 749 A.2d 997 (Pa. Commw. Ct.) ("[W]e refuse to hold a tenant strictly liable for unforeseeable criminal acts committed, without the tenant's knowledge, by family members who are not under the tenant's control."), app. denied, 764 A.2d 1073 (Pa. 2000), cert. denied, No. 00-1272 (Apr. 16, 2001).

In cases involving non-drug violent conduct, the courts have divided. Compare *Charlotte Hous. Auth.* v. *Patterson*, 464 S.E.2d 68, 71 (N.C. Ct. App. 1995) (must be showing of tenant's fault in case involving violence by household member), with *Chavez* v. *Housing Auth.*, 973 F.2d 1245, 1248 (5th Cir. 1992) (stating in case involving violence by household member or guest that "[t]he lease makes the tenant subject to eviction if any household member or guest conducts himself or herself in a manner inconsistent with the lease"); *Minneapolis Pub. Hous. Auth.* v. *Lor*, *supra* (no need for showing of fault in case involving violence by household member).

Moreover, in *Minneapolis Public Housing Authority* v. *Lor*, *supra*, the Supreme Court of Minnesota has squarely held, in a case that *did* involve an eviction based on the criminal conduct of a [redacted]-household member, that Section 1437d(*l*)(6) and the implementing HUD regulation authorized the termination of a lease and eviction of the tenant by a court, even though the trial court in that case found that the tenant had no knowledge of the criminal conduct of the household member and no reason to anticipate that conduct. These considerations, the court held, were instead factors the housing authority could take into account in deciding, in the exercise of its discretion, whether to terminate the lease and seek eviction. See 591 N.W.2d at 702, 703-704.

Although *Lor* involved a violent shooting by a household member, not drug-related activity, the question whether a tenant's lease may be terminated under Section 1437d(*l*)(6) for criminal conduct by a household member of which the tenant had no knowledge is the same under that Section for both types of criminal conduct. The Ninth Circuit's decision in this case thus

conflicts with that of the Minnesota Supreme Court in *Lor* as well.

3. The court of appeals misread the applicable statute and disrespected settled principles of administrative law in refusing to defer to HUD's interpretation.

a. The court of appeals erred in finding that the statutory text is ambiguous. Section 1437d(*l*)(6) requires a particular clause to be included in public housing leases. The clause does not condition a lease violation on the tenant's knowledge of the drug activity. Nor does it condition a lease violation on the tenant's "control" over the offender's criminal conduct, especially where, as here, the activity was undertaken by a "tenant" or a "member of the tenant's household." See note 8, *supra*. Instead, drug-related criminal activity by "any" individual within those categories is sufficient to warrant eviction. As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). To paraphrase *Gonzales*, because "Congress did not add any language limiting the breadth of that word," it must be read as "referring to all [tenants, members of the tenant's household, or guests]." *Ibid.*

b. Even if Section 1437d(*l*)(6) were ambiguous, however, HUD's regulation construing that statute not to require proof of knowledge or control by the tenant would be dispositive. The court gave four bases for its contrary conclusion. None of them supports the court of appeals' conclusion. But even if they did, they would at most show that the court's de novo interpretation of the statute is inconsistent with HUD's conclusion. Taken separately or together, they do not show that HUD's interpretation is impermissible under *Chevron*.

i. The court of appeals relied in large part on the "innocent owner" defense that Congress provided in 21 U.S.C. 881(a)(7) (1994) to civil forfeiture of any property (not merely a leasehold interest) that is used "to facilitate the commission of" drug related offenses. Pet. App. 15a-18a. That defense precludes forfeiture on the basis of "any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of th[e] owner." *Id.* at 43a n.6. Congress's determination to include an express innocent owner defense to civil forfeiture underscores the significance of Congress's failure to include any such defense or exception in the lease clause mandated by Section 1437d(*l*)(6). The civil forfeiture provision thus supports HUD's construction of the statute. See *id.* at 42a-44a (Sneed, J., dissenting). But even if we were incorrect in contending that the civil forfeiture provision affirmatively supports HUD's interpretation, the inclusion of that express defense in the civil forfeiture statute enacted four years before Section 1437d(*l*)(6) could not possibly establish that HUD's interpretation of the very different language of Section 1437d(*l*)(6)—which contains no similar clause and applies to consensual lease transactions rather than forfeitures that have nothing to do with consent—is impermissible.

ii. The court of appeals also relied on the proposition that applying the statute as written would lead to "absurd results," such as the eviction of tenants who in fact could not keep their household member from committing drug offenses, whose household member committed drug offenses at a place far removed from the public housing project, or whose household member committed a drug offense years ago. Pet. App. 21a-22a. The examples posited by the court of appeals, however, would not be "absurd" in all cases, and PHAs do not

ordinarily choose to evict tenants unless harsh results are in the end justified by the other benefits of the statute in its general operation.

There is no reason to believe that public housing authorities have exercised (or would exercise) their discretion to evict tenants in extreme cases; the only concrete example given by the court of appeals (that of tenant Rucker, see Pet. App. 22a) is one in which OHA dropped its effort to evict the tenant. Moreover, it is not at all unreasonable to believe that persons who commit drug offenses far from home will also commit (or have committed) similar offenses close to home as well. And the prospect of evicting a tenant because of a long-past drug offense of a household member or guest is not likely to be realistic; the statute as construed by HUD permits eviction only for drug-related criminal activity that occurs *while* the individual is a household member or guest. See 56 Fed. Reg. at 51,562 ("The question under the HUD rule is whether the person in question was in the premises with consent of a household member at the time of the criminal activity in question, not whether the person was a guest at some time in the past.").

In any event, whatever might be the appropriate course for a PHA to follow in the myriad factual scenarios that may arise, there can be no question that the broad sweep of Section 1437d(*l*)(6), as authoritatively construed by HUD, "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." Pet. App. 61a (Sneed, J., dissenting). It therefore offers hope to help resolve what Congress identified as a crisis situation in public housing, the foremost impact of which is on the truly innocent tenants in other units of the same

project whose households in no way contribute to the problem. The fact that the result might seem harsh in some instances in no way suggests that the scheme as a whole would lead to such "absurd results" that HUD's construction of the statute in accordance with its terms is impermissible. Cf. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574-576 (1982).

iii. The court's reliance on the legislative history of the 1990 version of Section 1437d(*l*)(6) also furnishes no justification for rejecting HUD's construction. The Senate Report on which the court relied (see Pet. App. 20a-21a) stated that cases arising under Section 1437d(*l*)(6) lease provisions "will require the wise exercise of humane judgment by the PHA and the eviction court" and that "eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." S. Rep. No. 316, *supra*, at 179; see also *id.* at 127 ("[T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t.").

The court of appeals failed to recognize that the committee report was discussing a Senate bill quite different from the one that was enacted, and one that imposed a considerably greater burden on the PHA in terms of what would constitute cause for eviction for drug-related crimes than Section 1436d(*l*)(6) as finally enacted. See 136 Cong. Rec. 15,991, 16,012 (1990) (reproducing S. 566, 101st Cong., 2d Sess. §§ 521(f) and 714(a) (1990), as they passed the Senate). The Conference Report declined to accept that language from the Senate bill and instead adopted the unqualified language of Section 1436d(*l*)(6). See H.R. Conf. Rep. No.

943, 101st Cong., 2d Sess. 418 (1990). Moreover, even the passages on which the court of appeals relied establish no more than an intent to endow PHAs with discretion and suggest how that discretion should be exercised. Those passages do not establish that Congress intended to withhold all discretion from PHAs to proceed with eviction in cases where they cannot prove knowledge or control by the tenant. And those passages in a report describing provisions that were not enacted into law certainly do not establish that Section 1437d(*l*)(6) as enacted forecloses HUD's interpretation.

iv. Finally, the court of appeals relied on the doctrine of constitutional avoidance to reject HUD's construction of Section 1437d(*l*)(6). The court based its conclusion on the proposition that "[p]enalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause," and that "HUD's interpretation would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing." Pet. App. 24a. Those principles, however, have no application here. Section 1437d(*l*)(6) does not impose a penalty. Instead, it enforces what is essentially a warranty by a tenant that his household will not be the source of a potential hazard (the commission of drug-related criminal offenses or the harboring of people who commit such offenses) to other tenants. The tenant is free to find other housing and thus not to make that warranty. This Court held in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), that a State constitutionally may forfeit an individual's interest in her own property to the State with no showing that she has engaged in any wrongdoing, intentional or otherwise. It follows *a fortiori* that a tenant may be evicted for her failure to comply

with a consensual provision to which she agreed in her lease, even if that failure was not otherwise her fault. That result follows from the straightforward application of settled principles of contract interpretation and enforcement.

4. Although the appeal in this case was taken from the issuance of a preliminary injunction, the procedural posture of the case poses no obstacle to this Court's review. The Ninth Circuit itself noted that, although it reviews a preliminary injunction for abuse of discretion, "[t]he district court * * * necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." Pet. App. 8a. Given the contentions of the parties in this case, the court stated that the issue before it was "the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo." *Id.* at 10a. The court went on to state its conclusions regarding the meaning of Section 1437d(*l*)(6) in entirely unequivocal terms. See, *e.g.*, *ibid.* ("Congress has spoken on the issue and * * * HUD's interpretation is contrary to congressional intent."); *id.* at 14a ("It is * * * our task to determine the meaning of subsection (6)."); *id.* at 21a ("Accordingly, we reject HUD's interpretation as contrary to the clearly expressed intent of Congress."); *id.* at 31a ("We find that Congress did not intend § 1437d(*l*)(6) to permit the eviction of innocent tenants."). The court of appeals also made quite clear that its holding turned on the provisions of Section 1437d(*l*)(6), not the particular lease terms at issue in this case. See *id.* at 28a ("Th[e] lease provision was required by the very HUD regulations we have invalidated, and is simply the embodiment of the erroneously broad interpretation of § 1437d(*l*)(6)."). Thus, the Ninth Circuit, sitting en banc, has definitively

interpreted Section 1437d(*l*)(6). That determination is not open to modification or reconsideration on remand in this case or in any other case. The legal issues are squarely presented at this time. For the reasons given above, review of the court of appeals' decision by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322, 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE;
BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY,
DEFENDANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, DEFENDANT-APPELLANT

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE;
BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY,
DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, DEFENDANT

Argued and Submitted March 12, 1999
Opinion filed Feb. 14, 2000
Rehearing En Banc Granted and
Opinion Withdrawn Aug. 18, 2000.
Aruged and Submitted En Banc Sept. 19, 2000
Filed Jan. 24, 2001

Before: SNEED, SCHROEDER, PREGERSON, REINHARDT, FERNANDEZ, T.G. NELSON, HAWKINS, SILVERMAN, MCKEOWN, GOULD, and PAEZ, Circuit Judges.

Opinion by Judge MICHAEL DALY HAWKINS; Dissenting by Judge SNEED

MICHAEL DALY HAWKINS, Circuit Judge:

Many of our nation's poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children. What these tenants may not realize is that, under existing policies of the Department of Housing and Urban Development ("HUD"), they should add another fear to their list: becoming homeless if a household member or guest engages in criminal drug activity on or off the tenant's property, even if the tenant did not know of or have any reason to know of such activity or took all reasonable steps to prevent the activity from occurring ("innocent tenants"). Today we examine the statutory basis behind HUD's "One Strike and You're Out" policy, and hold that Congress did not intend to authorize the eviction of innocent tenants.

I. *BACKGROUND*

It is undisputed that serious criminal activity, especially drug-related activity, has created a dangerous environment in many public housing projects. Officially recognizing that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," Congress sought to address the problem with the Anti-Drug Abuse Act of

1988. 42 U.S.C. § 11901(2). Congress required each public housing agency to utilize leases which:

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

42 U.S.C. § 1437d(*l*)(5) (1989). Congress altered the language of this provision slightly in 1990, to require leases that:

> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Id. (1991). In 1996, Congress replaced the phrase "on or near such premises" with "on or off such premises." *Id.* (1997). Finally, in 1998, the section was unchanged, but redesignated as subsection (*l*)(6), which is how we refer to it in this opinion. *Id.* (1999).

In 1991, HUD issued regulations implementing subsection (6), which track the pre-96 statutory language very closely. HUD required local public housing

authorities ("PHAs") to impose a lease obligation on tenants:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i). When issuing these regulations, HUD made it clear that it interpreted the statute (and its own regulations) as giving local PHAs the authority to evict a tenant whose household members or guests are involved in drug activity, whether the tenant knew or should have known of the activity or tried to prevent the activity. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) ("The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.").

Initially, HUD encouraged PHAs to use discretion in deciding whether to evict:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.

24 C.F.R. § 966.4(*l*)(5)(i). However, a directly conflicting message was sent to the PHAs in 1996 when President Clinton announced the "One Strike and You're Out" policy for combating crime in public housing, which encourages evictions regardless of circumstances and ties federal funding to increased crime-related evictions. John F. Harris, *Clinton Links Housing Aid to Eviction of Crime Suspects*, Washington Post, March 29, 1996, Section A, *available at* 1996 WL 3071468.

II. *FACTS AND PROCEDURAL BACKGROUND*

Because of the increased enforcement under the "One Strike" policy, we are now beginning to see exactly how far-reaching HUD's interpretation of § 1437d(*l*)(6) can be. In the case before us, the Oakland Housing Authority ("OHA") commenced separate unlawful detainer actions in Alameda County Municipal Court against four tenants—Pearlie Rucker, Willie Lee, Barbara Hill and Herman Walker—for violation of the lease provision obligating tenants to "assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in . . .

[a]ny drug-related criminal activity on or near the premises. . . ."

Pearlie Rucker is a sixty-three-year-old woman who has lived in public housing since 1985. She lives with her mentally disabled daughter, her two grandchildren and one great-granddaughter. OHA sought to evict Rucker because her daughter was found in possession of cocaine three blocks from the apartment. Rucker asserts that she regularly searches her daughter's room for evidence of alcohol and drug use and has never found any evidence or observed any sign of drug use by her daughter. Willie Lee, seventy-one, has been a public housing resident for over twenty-five years and Barbara Hill, sixty-three, has been a public housing resident for over thirty years. Lee and Hill currently live with their grandsons. OHA sought to evict Lee and Hill because their grandsons were caught smoking marijuana together in the apartment complex parking lot. Lee and Hill contend they had no prior knowledge of any illegal drug activity by their grandsons.

The fourth tenant, Herman Walker, presents a slightly different situation. He is a disabled seventy-five-year-old man who has lived in public housing for approximately ten years. He is not capable of living independently and requires an in-home caregiver. On three instances within a two-month time frame, Walker's caregiver and two guests were found with cocaine in Walker's apartment. Each time, Walker was issued a lease violation notice; with the third notice, OHA terminated the lease and initiated an unlawful detainer action. Shortly thereafter, Walker fired his caregiver.

In response to OHA's actions, the tenants filed the present action in federal district court under the Administrative Practices Act, 5 U.S.C. §§ 701-706 (the "APA"), arguing that 42 U.S.C. § 1437d(*l*)(6) does not authorize the eviction of innocent tenants. They also argued that if the statute does authorize such evictions, then the statute is unconstitutional. Plaintiff Walker also alleged that his eviction would violate the Americans with Disabilities Act ("ADA").

The tenants sought a preliminary injunction enjoining the unlawful detainer actions against them in state court and enjoining the enforcement of HUD's regulation and the corresponding provision in the OHA lease against innocent tenants. To obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised, and the balance of hardships tips sharply in favor of the moving party. *Roe* v. *Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998). Applying this standard, the district court found that the tenants had raised serious questions on their claim that HUD's interpretation of § 1437d(*l*)(6) violated the APA. Weighing the plaintiffs' loss of their homes against the delay in OHA's eviction proceedings, the district court found the balance of hardships tipped decisively in the tenants' favor, and enjoined OHA from "terminating the leases of tenants pursuant to paragraph 9(m) of the 'Tenant Lease' for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of and had no reason to know of, the drug-related criminal activity." The court also found that plaintiff Walker had raised a serious question with respect to whether his eviction violated

the ADA and enjoined OHA from evicting Walker on the basis of his caregiver's illegal drug use.

On appeal from the preliminary injunction, a panel of this court reversed the district court, holding that § 1437d(*l*)(6) authorized the eviction of innocent tenants, that HUD's interpretation was consistent with the statute, and that the statute, so interpreted, was not unconstitutional. *Rucker v. Davis*, 203 F.3d 627 (9th Cir. 2000). We granted review en banc and vacated the panel opinion. *Rucker v. Davis*, 222 F.3d 614 (9th Cir. 2000). We now affirm the district court's grant of the preliminary injunction.

III. *STANDARD AND SCOPE OF REVIEW*

This appeal presents the opportunity to clarify our standard and scope of review for preliminary injunctions, in particular, regarding when it is appropriate to reach the "merits" of the underlying case.

In general, we review a grant or denial of a preliminary injunction for abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). The district court, however, necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999); *Roe*, 134 F.3d at 1402. Thus, if the district court is alleged to have relied on an erroneous legal premise in reaching its decision to grant or deny a preliminary injunction, we will review the underlying issue of law, and we do so de novo. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

The scope of our review is likewise normally very narrow. We review whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case. *California Prolife Council v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999); *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995). We typically will not reach the merits of a case when reviewing a preliminary injunction. *Roe*, 134 F.3d at 1402; *Gregorio T.*, 59 F.3d at 1004. By this we mean we will not second guess whether the court correctly *applied* the law to the facts of the case, which may be largely undeveloped at the early stages of litigation. "As long as the district court got the law right, 'it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Id.* at 1004 (quoting *Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir. 1982)).

Of course, there will be cases in which the district court's interpretation of the law with respect to the underlying issues is challenged, and the resolution of such a legal question will be dispositive. If a district court's ruling rests solely on a legal question, and the facts are established or of no controlling relevance, then we may undertake a plenary review of the decision to grant a preliminary injunction. *Gorback*, 219 F.3d at 1091 (citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57, 106 S. Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled in part on other grounds, Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992)).

In this case, neither party suggests that the district court applied the wrong preliminary injunction standard. HUD and OHA, however, do assert that the district court misapprehended the law with respect to the breadth of § 1437d(*l*)(6). They contend the district court therefore based its decision on an erroneous legal interpretation, thereby abusing its discretion. Accordingly, we must turn to the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo. *See, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998); *Does 1-5*, 83 F.3d at 1152.

IV. *SECTION 1437d(l)(6)*

The parties agree that in interpreting § 1437d(*l*)(6), we apply the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*, the first question is whether Congress has directly spoken to the precise question at issue. *Id.* at 842, 104 S. Ct. 2778. To determine whether Congress has spoken on the question at issue, we employ the traditional tools of statutory construction; if Congress had an intent on this issue, that intent is the law and must be given effect. *Id.* at 843 n.9, 104 S. Ct. 2778.

In this case, a number of statutory construction principles lead us to conclude that Congress has spoken on the issue and that HUD's interpretation is contrary to congressional intent. In determining whether Congress has specifically addressed the question at issue, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, ——, 120 S. Ct. 1291, 1300, 146 L.Ed.2d 121 (2000). Rather, the "the words of a statute must be read in

their context and with a view to their place in the overall statutory scheme." *Id.* at ——, 120 S. Ct. at 1301 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989)). When the proper interpretation of a statute is not clear from the language of the text or the broader context of the statute as a whole, the legislative history offers valuable guidance and insight into Congressional intent. *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir. 1997). We will not assume that Congress intended a statute to create odd or absurd results. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994) (citing *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 453-455, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989)). Finally, because we cannot presume Congress intended an unconstitutional result, whenever possible, statutes should be construed to avoid serious doubts as to their constitutionality. *Id.* at 78, 115 S. Ct. 464.

Because we find that Congress had an intention on the precise question at issue that is contrary to HUD's construction, HUD's interpretation is not entitled to deference. *See Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* Thus, we do not reach the question under *Chevron* of whether an administrative interpretation is reasonable or permissible, for "[i]f the intent of Congress is clear, that is the end of the matter." *Id.* at 842, 104 S. Ct. 2778.

A. Textual Interpretation

We begin with the text of the statute. Section 1437d(*l*)(6) provides that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." HUD essentially argues that "any" means "all," asserting that if a drug-related crime occurs by any of the enumerated individuals, then the statute clearly permits eviction of all tenants under the lease, regardless of personal involvement in or knowledge of the crime. The language of the statute, however, does not appear as plain as HUD would like it to be. The statutory provision does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted. Although the statute permits "termination of tenancy," it does not answer the question of *whose* tenancy. In situations with multiple tenants, does the statute authorize eviction of the offending party only, or all persons on the lease?

The parties debate the significance that should be attributed to the use of the phrase "under the tenant's control." HUD argues that this phrase modifies only the term "other person" and that "control" means only that this other person has the tenant's consent to be in the tenant's unit. The tenants contend that "control" involves the "exercise of a restraining or directing influence" over another, and that this applies to all of the words in the group, i.e., household members, guests *and* other persons. The tenants further argue that it is implicit from the use of this wording that Congress intended tenants to be held accountable for the actions

of those persons who are subject to their control, but that the statute does not impose sanctions on tenants who have taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically be expected to exercise control over the conduct of another.

The text of subsection (6), viewed in isolation, does not compel either party's interpretation. We therefore turn to the specific context in which the language is used and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997).

1. Section 1437d(*l*)

In examining the language of the statute, we must look to its place in the overall statutory scheme and "fit, if possible, all parts into a harmonious whole," *Brown & Williamson*, 529 U.S. at ——, 120 S. Ct. at 1301 (quoting *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389, 79 S. Ct. 818, 3 L.Ed.2d 893 (1959)). First established in 1937, the public housing program was a response to an acute shortage of "decent and safe dwellings for low-income families." 42 U.S.C. § 1437. Understanding that these low income tenants face grave adversity if evicted, Congress has put a number of protections in place that limit the ability of local PHAs to evict. In § 1437d(*l*) itself, the local PHAs are prohibited from using leases with unreasonable terms and conditions. Another subsection also provides that the leases must not permit the PHA to terminate tenancies except for "serious or repeated violation of the terms or conditions of the lease or for other good cause." § 1437d(*l*)(5). We believe reading section (*l*) as a "harmonious whole," requires us to presume that Congress also intended

subsection (6) to be construed as a reasonable lease term and to permit eviction only if there is good cause.

It is, of course, our task to determine the meaning of subsection (6) and not its wisdom. Our task is to examine HUD's construction of subsection (6) in light of and in relation to the other provisions of section (*l*). There is undisputedly a significant problem with crime and drugs in public housing. The goal of providing safe and drug-free public housing is well served by permitting the local PHAs to evict tenants who engage in the proscribed criminal activities. It is also furthered by imposing a duty on tenants to take reasonable steps to control the drug or criminal activity of family members and guests or face eviction. There is no dispute that the eviction of tenants who personally engage in drug activity or of tenants who turn a blind eye to the activities of household members or guests falls squarely within the language of the statute under either party's reading.

While the policy considerations pointed out by the dissent may apply to the eviction of culpable tenants [Dissent at 1128 - 42], we do not believe they support the eviction of innocent ones. Imposing the threat of eviction on an innocent tenant who has already taken all reasonable steps to prevent third-party drug activity could not have a deterrent effect because the tenant would have already done all that tenant could do to prevent the third-party drug activity. Likewise, evicting the innocent tenant will not significantly reduce drug-related criminal activity in public housing, since the tenant has not engaged in any such activity personally or knowingly allowed such activity to occur. HUD's construction of subsection (6) would allow such

irrational evictions, and thus would require PHAs to include an unreasonable term in their leases and permit eviction without good cause. Read in the context of the overall statutory scheme and in light of the legislative history (discussed below), we cannot say Congress intended such a result.

2. Forfeiture Provision

Another amendment enacted at the same time as the original version of § 1437d(*l*)(6) also leads to the conclusion that Congress did not intend to allow the eviction of innocent tenants. In the same chapter and subtitle of the Anti-Drug Abuse Act of 1988, Congress passed both the original version of subsection (6) and also amended a pre-existing civil forfeiture provision of the Controlled Substances Act, 21 U.S.C. § 881(a). The two statutes at issue were enacted together as parts of a single legislative scheme to combat drug abuse in public housing. The legislative history indicates how Congress envisioned the statutes working together:

> Chapter 1 of this subtitle codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families or their guests engage in drug-related criminal activity. It also allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing leases are considered property with respect to civil forfeiture laws.

134 Cong. Rec. S17,360-02 (Nov. 10, 1998) *available at* 1988 WL 182529 (Cong. Rec.).

The forfeiture provision was amended by inserting the phrase "(including any leasehold interest)" into the text of the pre-existing statute. The amended statute then read in relevant part:

> The following shall be subject to forfeiture to the United States. . . .
>
> . . . .
>
> (7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . . *except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

21 U.S.C. § 881(a) (emphasis added).[1]

HUD suggests we should place no importance on the availability of what clearly was an innocent owner

[1] The "innocent owner" defense which then appeared in 21 U.S.C. § 881(a)(7) is now codified at 18 U.S.C. § 983(d) as part of the general rules for civil forfeiture procedures. In enacting § 983(d), Congress clarified that an "innocent owner" is one who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A). This continues to be consistent with our reading of § 1437d(*l*)(6).

defense in the forfeiture provision, pointing to the differences between civil forfeiture and lease eviction proceedings. Although different animals, the Supreme Court instructs that the meaning of one statute may be illuminated by the language of another. *Brown & Williamson*, 529 U.S. at ——- - ——, 120 S. Ct. at 1300-01. When dealing with two different statutes which not only govern the same subject matter but were also enacted at the same time in the same chapter of the same Act, we presume Congress meant them to be read consistently. HUD correctly points out that the forfeiture provision deals with forfeitures of the leasehold to the federal government, while § 1437d(*l*)(6) deals with eviction by local PHAs. Although different processes, the purpose of both is the same. Moreover, the result is the same: the tenant loses the leasehold interest, which is taken over by a governmental entity. It makes little sense to provide protections for the innocent tenant from the federal government but not from local housing authorities.[2]

HUD and the dissent also argue that the forfeiture provision illustrates that Congress knows how to provide an innocent tenant defense when it wants to,

[2] The dissent attempts to distinguish the provisions by arguing that Congress must have decided to provide substantive protections to owners that it did not provide to tenants. [Dissent at 1132]. Yet, § 881(a)(7) specifically applies to leasehold interests, and the legislative history indicates Congress was specifically thinking of public housing leases when it added this provision. We cannot agree with an interpretation of § 881(a)(7) that would not apply the innocent owner defense contained therein to the owners of leasehold interests. Congress's recent clarification of the innocent owner defense confirms our interpretation. 18 U.S.C. § 983(d)(6)(A).

and that since it did not use the very same language in § 1437d(*l*)(6), it must not have intended for one to be available. [Dissent at 1132]. We agree that the innocent tenant defense in § 881(a)(7) was more clear; it was also drafted by a different Congress than the one which enacted § 1437d(*l*)(6), which significantly weakens HUD's argument. *Cf. Lindh v. Murphy*, 521 U.S. 320, 330, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997) (negative implication argument is strongest when different provisions were joined together and considered simultaneously when the language giving rise to the implication was inserted). The concurrent amendment of § 881(a)(7) did not touch the previously drafted innocent owner defense; it merely extended the forfeiture provision to include leasehold interests.

We are unpersuaded by the negative implication argument. To say Congress could have drafted the defense more explicitly in § 1437d(*l*)(6) is not to say it did not do so at all.

3. Section 1437d(c)(4)(A)(iii)

HUD asserts that its interpretation of § 1437d(*l*)(6) is reinforced by a version of § 1437d(c)(4)(A)(iii) which was in effect until 1996. This version prohibited individuals or families who were evicted because of drug-related criminal activity from receiving a statutory housing preference for three years, but exempted "any member of a family of an individual" who the agency determined "clearly did not participate in and had no knowledge of such criminal activity." HUD argues that if innocent tenants could not be evicted under § 1437d(*l*)(6), there would have been no need for such an exemption, which would have rendered § 1437d(c)(4)(A)(iii) surplusage.

The language HUD relies on is no longer part of the statute. We are therefore hesitant to even address an argument for harmonious interpretation when there is no longer a provision to harmonize. We do, however, note that even as originally drafted, § 1437d(c)(4)(A)(iii) was not entirely inconsistent with the tenants' interpretation of § 1437d(*l*)(6). For example, an entire family, including minor children, can be evicted under § 1437d(*l*)(6) if the parent engages in drug-related activities. These children, upon reaching the age of eighteen, would become eligible for public housing. The prior version of § 1437d(c)(4)(A)(iii) would have waived the three-year disqualification period for such children if they were not participants in the criminal activity which caused the family to be evicted, which means that this provision would not have been surplusage under the tenants' interpretation.

4. Summary

Section 1437d(*l*)(6) is not a picture of clarity and may be subject to varying interpretations. When read in conjunction with the remainder of § 1437d(*l*) and other provisions enacted at the same time, however, it appears that Congress did not intend subsection (6) to apply to the eviction of innocent tenants. Any doubts that persist about Congress's intentions, however, are firmly resolved by the legislative history and the principles of statutory construction we discuss below.

B. Legislative History

If the intent of Congress is not clear from the language of the statute and the broader context of the statute as a whole, we consult the legislative history. *Hockings*, 129 F.3d at 1071. In doing so, we place par-

ticular emphasis on the committee reports accompanying the statute. *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L.Ed.2d 472 (1984).

No House or Senate reports accompanied the original version of § 1437d(*l*)(6), which was enacted as part of the Anti-Drug Abuse Act of 1988. In 1990, however, Congress amended the provision in question, and the legislative history specifically addressed the issue before us. The Senate Report explains:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. The report also addressed an identical passage in the Section 8 housing assistance program: "The Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist." *Id.* at 5889.

HUD contends the legislative history indicates Congress's intent to confer wide discretion on HUD and the local PHAs. It focuses on the statement that "each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court." It is true that the PHAs have discretion in deciding whether to initiate an

eviction action under the statute, but this is true whether the statute authorizes eviction of innocent tenants or not. In other words, this passage suggests that even in a case involving a "culpable" tenant, the case must be looked at on its individual merits, which may counsel against eviction, even though eviction is clearly authorized by the statute.[3]

In these reports, however, Congress specifically rejects the notion that the PHAs' discretion is so broad that it extends to the eviction of innocent tenants. These reports are very clear that such evictions *would not* be appropriate, and that in such circumstances good cause to evict *would not* exist. The latter statement is also consistent with our discussion above that § 1437d(*l*)(6) must be read in conjunction with the good cause requirement of § 1437d(*l*)(5). Accordingly, we reject HUD's interpretation as contrary to the clearly expressed intent of Congress. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778.

C. Absurd Results

Even if we did not find that the legislative history supports the tenants' interpretation, a number of other

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[3] HUD took the position at oral argument that an eviction court could only consider whether or not the lease term was violated, and could not review the PHAs' decision that the violation warranted eviction. This issue is not before the court today, but we note that the quoted passage suggests that eviction courts *do* have a role to play in evictions under § 1437d(*l*)(6) and that the PHAs' discretion does not appear to be unchallengeable. *See, e.g.*, Robert Hornstein, *Mean Things Happening in This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U.L.Rev. 257 (1996) (discussing abuse of discretion defense in PHA eviction cases).

statutory interpretation tools would lead us to the same result. It is well established that we will not assume Congress intended an odd or absurd result. *X-Citement Video*, 513 U.S. at 69-70, 115 S. Ct. 464; *Public Citizen*, 491 U.S. at 453-55, 109 S. Ct. 2558.

We need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD's interpretation. HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless. HUD has also taken the position that the statute would apply and permit eviction of an entire family if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child's actions 3,000 miles away.[4] HUD also asserted the provision would apply and authorize eviction if a household member had been convicted of a drug crime years earlier, arguing that the local PHA would have the discretion to determine if eviction were warranted in such circumstances.

Although the dissent contends the Supreme Court frowns on consideration of hypothetical applications of statutes [Dissent at 1130], the Court itself has clearly looked beyond the facts of individual cases to the

[4] We should note that the HUD regulation employs language from an earlier version of the statute, and requires that the drug activity be "on or near" the premises, thus restricting the geographical reach of the provision. 24 C.F.R. § 966.4(f)(12)(i). HUD acknowledges, however, that under the amended statute, there is no such geographic limitation.

broader ramifications of a given interpretation when evaluating whether such interpretation creates absurd results. *See, e.g., X-Citement Video*, 513 U.S. at 69, 115 S. Ct. 464. The absurdity and unjustness of the potential results in this case confirms that HUD has missed the mark in discerning Congress's intent.

The dissent also argues that because Congress has not amended § 1437d(*l*)(6) to more clearly address the innocent tenant issue, this must mean that Congress intended these results, even if we may think them odd. [Dissent at 1134]. Congress's inaction, however, may cut both ways. To the extent Congress may be aware of how HUD and some courts have interpreted this provision, it must have also been aware that other courts were refusing to evict innocent tenants. *See, e.g., Charlotte Hous. Auth. v. Patterson*, 120 N.C.App. 552, 464 S.E.2d 68, 72 (N.C. App. 1995); *Richmond Tenants Org., Inc. v. Richmond Redev. and Hous. Auth.*, 751 F. Supp. 1204, 1205-6 (E.D. Va. 1990). And yet, Congress did not clarify the statute. Furthermore, the One Strike policy, which has led to increased enforcement and less exercise of discretion by the PHA's, was only announced in 1996, the same year as the last substantive amendment to the section. Only now are cases beginning to surface which illustrate the breadth of HUD's interpretation and which may attract enough attention to merit reconsideration or clarification of the statute by Congress.

D. Constitutional Avoidance

It is also a settled principle of statutory interpretation that whenever possible, a statute should be construed to avoid substantial constitutional concerns. *X-Citement Video*, 513 U.S. at 69, 115 S. Ct. 464. HUD's

interpretation of § 1437d(*l*)(6), however, would raise serious questions under the Due Process Clause of the Fourteenth Amendment.

Penalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause. *Scales v. U.S.*, 367 U.S. 203, 224-25, 81 S. Ct. 1469, 6 L.Ed.2d 782 (1961); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490, 35 S. Ct. 886, 59 L.Ed. 1419 (1915). Public housing tenants have a property interest in their tenancy. *Greene v. Lindsey*, 456 U.S. 444, 451, 102 S. Ct. 1874, 72 L.Ed.2d 249 (1982); *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483, 488-89 (9th Cir. 1974). HUD's interpretation would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing.

HUD contends that the Supreme Court's decision in *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996), forecloses any argument that depriving an innocent owner of a property right violates due process. In *Bennis*, a woman's husband used their jointly owned car to engage in sexual activity with a prostitute. *Id.* at 443, 116 S. Ct. 994. The car was forfeited and the wife contested the forfeiture on due process grounds. *Id.* at 446, 116 S. Ct. 994. In a 5-4 decision, the Court upheld the forfeiture, but did so narrowly on facts which are easily distinguishable from the instant case.

The *Bennis* Court pointed out that the proceeds from the sale did not exceed the costs of the sale so there was "practically nothing left" for Mrs. Bennis. *Id.* at 445, 116 S. Ct. 994; *id.* at 456, 116 S. Ct. 994 (Thomas, J., concurring); *id.* at 458, 116 S. Ct. 994 (Ginsburg, J., concurring). The Court also noted the equitable nature of the Michigan forfeiture proceeding, and that the state court had taken special note of the fact the Bennises had a second automobile. *Id.* at 445, 116 S. Ct. 994; *id.* at 458, 116 S. Ct. 994 (Ginsburg, J., concurring). In this case, there is much more at stake than a negligible financial interest in a family's second car: these families risk losing their entire property interest in their homes.

Most important, in *Bennis*, the Court suggested that the fact that the property was used in criminal activity was decisive; the Court held that the spouse's due process claim was defeated by "a long and unbroken line of cases hold[ing] that an owner's interest in property may be forfeited *by reason of the use to which the property is put* even though the owner did not know that it was to be put to such use." *Bennis*, 516 U.S. at 446, 116 S. Ct. 994 (emphasis added); *see also id.* at 450, 116 S. Ct. 994 (discussing the requirement that the property be an "instrumentality" of crime). In this case, with the exception of Plaintiff Walker's caregiver, the illegal activities took place off the premises leased by the plaintiffs. Thus, the leasehold interest was *not* used in connection with the crime.

Justice Thomas's concurring opinion in *Bennis* expanded on the Court's statement that the forfeiture was justified because the property in question was an instrumentality of the crime by strongly suggesting that a due process claim exists if there has been a forfeiture of property that was not used in the commission of a crime and the owner of the property had no knowledge of the illegal activity. *Id.* at 455-56, 116 S. Ct. 994 (Thomas, J., concurring); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94

S. Ct. 2080, 40 L.Ed.2d 452 (1974). Therefore, we believe HUD's interpretation of § 1437d(*l*)(6), which would permit the deprivation of a tenant's property interest when the property was not used in the commission of a crime and when the tenant did not know of the illegal activity, would raise serious due process questions.[5]

It is not necessary, however, to reach this constitutional issue if there is a construction of § 1437d(*l*)(6) which avoids the question and is "not plainly contrary to the intent of Congress." *X-Citement Video*, 513 U.S. at 78, 115 S. Ct. 464. The tenants have proposed such a construction, by reading the use of the term "control" as a limitation on the breadth of the provision. Today we adopt that interpretation and hold that if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant. *Cf. id.* (reading "knowing" requirement of one criminal element as applying to second criminal element to avoid serious constitutional doubts); *Ma v. Reno*, 208 F.3d 815, 828 (9th Cir. 2000) (finding reasonable time

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[5] Several legal commentators have also recognized the potential due process problems with HUD's interpretation. *See, e.g.*, Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 Yale L. & Pol'y Rev. 161, 179 (1991) (vicarious liability makes HUD eviction policy both distressing and constitutionally suspect); Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 Tex. L.Rev. 1495, 1522-24 (1998) (noting due process problems because no relationship between liability and the action of the tenant).

limitation implicit in statute to avoid serious due process concerns).

V. *PRELIMINARY INJUNCTION*

A. APA Claim

The district court granted a preliminary injunction on the tenants' APA claim because it found that the tenants had raised serious questions and that the balance of hardships tipped sharply in their favor, since they could lose their homes if OHA's actions were not halted. The district court enjoined OHA from pursuing its unlawful detainer actions against Lee and Hill.[6] The district court also enjoined OHA from terminating any other leases for off-premises drug-related activity in which the tenant did not know of or have reason to know of the criminal activity.

Reviewing the interpretation of § 1437d(*l*)(6) de novo, we have concluded that HUD's interpretation is inconsistent with Congressional intent and must be rejected. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778. The question remains whether the district court properly enjoined OHA from evicting innocent tenants pursuant to paragraph 9(m) of the OHA lease. This provision was required by HUD regulations (24 C.F.R. § 966.4(f)(12)(i)), which were, as discussed above, premised on HUD's erroneous interpretation of § 1437d(*l*)(6).

Paragraph 9(m) is not an ordinary term found in residential leases and should not be treated as such.

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[6] OHA dismissed the unlawful detainer proceeding against Rucker.

There is certainly no bargained-for-exchange in public housing leases. The form of public housing leases is almost entirely dictated by HUD. This lease provision was required by the very HUD regulations we have invalidated, and is simply the embodiment of the erroneously broad interpretation of § 1437d(*l*)(6). As we discussed in section IV.A. above, such a provision would be unreasonable, and including an unreasonable term in a public housing lease is prohibited under § 1437d(*l*), as are evictions without good cause.[7]

Accordingly, we find that the district court properly granted the preliminary injunction generally enjoining OHA from pursuing evictions under paragraph 9(m) to the extent it seeks to do so for off-premises drug-related activity in which the tenant did not know of or have reason to know of the criminal activity.[8] OHA remains free to proceed with evictions for off-premises drug activities when it can prove the tenant knew or should have known of the activity.[9] Likewise, the district court specifically permitted OHA to pursue evictions of tenants when the drug-related activity

[7] There are also substantial constitutional considerations associated with enforcing this provision, as discussed in Section IV.D., above.

[8] We undertake plenary review of this portion of the injunction because it presents a situation in which the legal issues underlying the injunction are dispositive, and the facts of the individual claims are of no controlling relevance. *Gorbach*, 219 F.3d at 1091.

[9] The district court's injunction does not address the issue of whether tenants who have knowledge of off-premises drug activities by household members may be evicted if they attempt in good faith to prevent their household members from engaging in such activity, but are unable to do so. Accordingly, we do not consider that question here.

occurs within the tenant's apartment, creating a rebuttable presumption that a tenant controls what occurs in his or her unit.[10] These directives are perfectly consistent with our interpretation of "control" in § 1437d(*l*)(6). We therefore affirm this portion of the injunction.

With respect to the portion of the injunction which enjoins OHA from pursuing its unlawful detainer actions against Lee and Hill, the facts of the underlying cases come into play. OHA, however, has not contested the assertions of Lee and Hill that they did not know or have reason to know of their grandsons' drug use. Assuming these facts are true, Lee and Hill qualify as innocent tenants. On the facts before it, the district court did not abuse its discretion by enjoining their unlawful detainer actions.

B. Walker's ADA Claim

Plaintiff Walker presents a different situation, since the illegal drug activity occurred within his apartment, and, at least after the first violation notice, he had knowledge of the criminal activity. The district court ultimately decided to enjoin Walker's unlawful detainer action, finding that Walker had raised a serious question with respect to whether the eviction violated the ADA, and that the balance of hardships weighed in favor of permitting him to remain in his home until the ADA claim was fully litigated.

[10] This presumption should assuage some of the dissent's concerns about the burden of proof placed on the local PHA. [Dissent at 1136]

The district court noted that Walker alleged he required an in-home caregiver because of his disability and that he alleged he was not physically able to search persons entering his apartment. The district court concluded that the ADA might require some form of accommodation in the eviction policies for his situation, citing an Oregon case which required the housing authority to modify its "no dogs" policy for a hearing impaired tenant. *Green v. Hous. Auth. of Clackamas County*, 994 F. Supp. 1253, 1257 (D. Or. 1998). Although OHA asserted that there could be no reasonable accommodation in Walker's case because the only alternative would be a "blanket exemption" from the drug policy, the district court found that, based on the allegations of the complaint, it could not rule as a matter of law that no reasonable accommodation exists.

Walker's ADA claim is replete with factual questions, including whether the guests in the apartment were Walker's or the caregiver's, and whether Walker's disability prevented him from being able to search his caregiver or her guests. There are no answers to these questions at this stage of the proceedings. The district court's decision to grant the injunction on the ADA claim turns on the application of law to the facts of Walker's case. The district court applied the proper standard for issuing a preliminary injunction, and appears to have correctly apprehended the law of the ADA. We will not reverse simply because we might reach a different result on the limited facts before us. *Gregorio T.*, 59 F.3d at 1004. A factfinder may ultimately determine that Walker cannot state a claim under the ADA or that OHA provided Walker with a reasonable accommodation by giving him two warnings and two months to find a new caregiver. On the facts

before the district court at the time it made its decision, however, the district court did not abuse its discretion in entering the preliminary injunction with respect to Walker's ADA claim.

VI. *CONCLUSION*

We find that Congress did not intend § 1437d(*l*)(6) to permit the eviction of innocent tenants. Thus, HUD's contrary interpretation must be rejected. The district court therefore properly enjoined OHA from pursuing evictions based on the erroneous interpretation of § 1437d(*l*)(6) as embodied in the OHA lease. On the limited factual record before it, the district court did not abuse its discretion in enjoining Walker's eviction with respect to his ADA claim. The grant of the preliminary injunction is AFFIRMED.

SNEED, Circuit Judge, with whom Judges FERNANDEZ, T.G. NELSON, and SILVERMAN, Circuit Judges, join, dissenting:

In 1988, faced with a devastating and worsening epidemic of drug related crime and violence in public housing, Congress granted to local public housing authorities ("PHAs") a new tool in the struggle to provide decent and safe low income housing. 42 U.S.C. § 1437d(*l*)(6) mandated that every lease entered into by a PHA include a provision permitting termination of tenancy when "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engaged in "drug-related criminal activity on or near public housing premises."

In mandating this lease provision and thereby granting additional discretion to local housing authorities, Congress used unmistakably clear statutory language based on reasonable findings that such legislation was necessary and would be effective. The majority's decision reads into this statute a defense that the legislative branch rejected. Nothing in the Constitution prohibits the government from entering into reasonable lease provisions necessary to maintain the safety and structural soundness of its property. "The increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures." 42 U.S.C. § 11901(4). Indeed, if the government is to act as a landlord, the Constitution must permit it to act as a prudent one.

STANDARD OF REVIEW: CHEVRON DOCTRINE

Congress authorized a tenant's eviction from public housing when that "tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "any drug-related criminal activity, on or off such premises." The question here presented is whether this language permits local PHAs to evict tenants who were ignorant of their household members' or guests' drug use ("ignorant tenants"). The answer to this question should be that it does permit such evictions.

The Department of Housing and Urban Development (HUD), the agency charged with administering public housing, properly concluded that the statute did authorize the eviction of ignorant tenants. 24 C.F.R. § 966.4(*l*)(1)(B); *Public Housing Lease and Grievance Procedures*, 56 Fed. Reg. 51,560, 51,567 (October 11, 1991). If this interpretation is a "permissible construction of the statute," then this court may not substitute its own judgment for that of HUD. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Because the statute is clear on its face, HUD's interpretation is the only permissible construction of the statute.

The majority points out that the statute is silent on the question of a tenant's required knowledge. This alters the relevant inquiry only slightly. The majority must explain why the regulation that tracks the precise language of the statute is not reasonable. *Id.* at 844, 104 S. Ct. 2778. In short, whether one accepts our contention that the statutory language is clear or the majority's argument that the language is silent, application of the *Chevron* test to the present controversy

leads to the same conclusion. HUD's regulation permitting the eviction of ignorant tenants whose household members or guests engaged in drug related criminal activity on or off public housing premises is valid and enforceable.

The majority avoids the dictates of *Chevron* by finding that "Congress had an intention on the precise question at issue that is contrary to HUD's construction." *Maj. Op.* at 1119. The majority's evidence, however, is wholly insufficient to support this conclusion. We will discuss the evidence in greater detail below, but note here the gap between what the majority purports to prove and what it has in fact shown. According to the majority, the language of the statute is ambiguous. *Maj. Op.* at 1120.[1] The legislative history noted by the majority is equally ambiguous. It simultaneously provides discretion to local PHAs and suggests how that discretion should be exercised. "It is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations." *Rust v. Sullivan*, 500 U.S. 173, 189-190, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991).

The remainder of the majority's congressional intent argument flows from its holding that permitting the eviction of ignorant tenants is "unreasonable" and "absurd." This holding, however, is directly contrary to HUD's interpretation of the statute. In such a circumstance, this court should defer to HUD's judgment. It is HUD, after all, that has experience and expertise in

[1] Indeed, the doctrine of constitutional doubt, on which the majority relies, is only applicable when a statute is ambiguous.

the management of public housing. It is HUD, and not this court, that can best determine what is reasonable in the context of the public housing drug crisis.

If the majority believes HUD's construction of the statute is unconstitutional, it should say so. This court must step in when other branches of government exceed their constitutional authority. However, when this court rewrites legislative enactments and ignores the considered judgment of executive agencies—based on nothing more than the majority's understanding of what is "reasonable" or "absurd"—it is this court that has overstepped its constitutional limits.

DISCUSSION

I. The Language, Legislative History, and Statutory Context of 42 U.S.C. § 1437d(*l*)(6) All Show that The Eviction Provision Applies to Ignorant Tenants.

A. *The Plain Language of the Statute Authorizes the Eviction of Ignorant Tenants Under 42 U.S.C. § 1437(d)(l)(6)*

"Where there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. 1, 8, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96, 5 L.Ed. 37 (1820)). In the present case, the statute authorizes eviction when a "public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "any drug related criminal activity." The majority reads into this statute the requirement that the tenant must be able to "realistically exercise

control" over a household member or guest before eviction proceedings may begin. We do not believe the statute includes such a requirement. Rather, the obvious reading of the statute is to the contrary.

Under § 1437d(*l*)(6) there are four categories of individuals whose drug related criminal activity on or near public housing property will result in the tenant's eviction. First, the tenant is responsible for his or her own drug use. Second, criminal drug activity by the tenant's household members is cause for termination.[2] Third, the tenant's guests may not engage in criminal drug activity.[3] Fourth, criminal drug activity by other persons under the tenant's control is also cause for eviction.

The structure of the statute suggests that tenants, household members, and guests are *per se* under the tenant's control and, therefore, the drug related criminal activity of anyone in one of these categories is cause for eviction. The tenant exercises "control" over these individuals when he or she permits them to reside in or visit the premises. No additional level of "control" is necessary. Congress's use of the disjunctive connector "or" followed by the phrase "other person" shows it intended a fourth category of "other persons" who did not fall into the three enumerated categories, but whose drug activity could nevertheless result in eviction.

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[2] HUD defines "members of the household" as those individuals who are listed as such by name on the lease. 24 C.F.R. § 966.4(a)(2).

[3] HUD defines a "guest" as "a person in the leased unit with the consent of a household member." 24 C.F.R. § 966.4(d)(1)

The majority's reading of the statute requires that the drug user fall into two of the categories—a drug user must be both a household member/guest *and* under the tenant's control. *See Maj. Op.* at 1119-20. But, the statute does not say this. The majority's reading renders the enumerated categories (tenants, household members, guests) superfluous. "We read [the statute] with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate . . . to treat [as surplusage] statutory terms in any setting. . . .'" *Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 133 L.Ed.2d 472 (1995) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-141, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994)).

The majority justifies its tortured reading of the statute on the grounds that enforcement of the plain language of § 1437d(*l*)(6) would lead to absurd results. Specifically, both the district court and the majority note that the statute contains neither temporal nor geographic limitations on the drug related criminal activity. Therefore, a tenant could be evicted if that tenant's guest used drugs "five years earlier on the other side of the country." The district court reasoned that the possibility of any absurd result (even one not presented by the actual controversy) rendered the statutory language ambiguous.

This approach is untenable. It would permit the judiciary to nullify any legislative act amenable to a single absurd hypothetical construction. This approach is inconsistent with the traditional role of a court to adjudicate the specific controversy before it and to avoid speculative and general pronouncements. The Supreme Court has repeatedly rejected judicial review

of hypothetical applications of statutory language. *FCC v. Pacifica*, 438 U.S. 726, 743, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978) ("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, [citation omitted] but will deal with those problems if and when they arise."); *Lindsey v. Normet*, 405 U.S. 56, 65, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972) ("[P]ossible infirmity in other situations does not render [a statute] invalid on its face."); *Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746, 62 S. Ct. 820, 86 L.Ed. 1154 (1942) (court will not "assume in advance that a State will so construe its law as to" make it unenforceable). The issue before the court is not whether Congress legislated a temporal nexus between the guest's drug-related criminal activity and the eviction.[4] This court must limit its review to the controversy actually presented.

The Supreme Court, in *Atlantic Mut. Ins. Co. v. Comm'r of Internal Revenue*, 523 U.S. 382, 118 S. Ct. 1413, 140 L.Ed.2d 542 (1998), was asked to determine the meaning of the term "reserve strengthening" as used in the 1986 Tax Reform Act. Petitioner contended that the agency interpretation of the term was unreasonable because "in theory, it produces absurd results." *Atlantic Mut. Ins. Co.*, 523 U.S. at 389, 118 S. Ct. 1413. In support of this position, petitioner presented to the court a hypothetical example where application of the agency definition would result in manifest error. The

[4] Were that the issue, we might be required to analyze this case under the second prong of the *Chevron* doctrine (i.e. determine if HUD's interpretation of this provision is reasonable).

Court refused to find the agency interpretation unreasonable. *Id.* at 390, 118 S. Ct. 1413. It held that, despite the possibility of future error, the agency interpretation of the statute should control.

In this case, the plain meaning of the statute is not absurd. In fact, as we discuss below, *see infra*, the eviction of ignorant tenants whose guests engage in drug-related criminal activity is supported by a reasonable rationale based on sound public policy. It is our obligation to read the statute as it was written even while "acknowledg[ing] the reality that the reach of a statute often exceeds the precise evil to be eliminated." *Brogan v. United States*, 522 U.S. 398, 403, 118 S. Ct. 805, 139 L.Ed.2d 830 (1998).

We assume the legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 71 L.Ed.2d 748 (1982). The statute says "drug related criminal activity . . . engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." The majority asserts that in writing this language, Congress *meant* to say that drug related criminal activity engaged in by any person under the tenant's control shall be cause for termination of tenancy. There is simply no support in the language for this interpretation.

B. *Related Statutory Provisions and Legislative History Reveal Congressional Intent to Omit an Innocent Tenant Defense*

1. *Related Statutory Provisions*

Two related statutory provisions further reinforce the conclusion that § 1437d(*l*)(6) authorizes the eviction of public housing tenants who are ignorant of their guests' drug-related criminal behavior.

a. *42 U.S.C. § 1437d(c)(4)(A)(iii)*[5]

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[5] 42 U.S.C. § 1437d(c)

(4) the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to—

(A) . . . the establishment of tenant selection criteria which—

(i) . . . give preference to families that occupy substandard housing (including families that are homeless or living in a shelter for homeless families), are paying more than 50 percent of family income for rent, or are involuntarily displaced . . . at the time they are seeking assistance under this chapter.

. . .

(iii) *prohibit any individual or family evicted from housing assisted under the chapter by reason of drug related criminal activity from having a preference under any provision of this subparagraph for 3 years* . . . except that the agency may waive the application of this clause under standards established by the Secretary (which shall include *waiver for any member of a family of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity* . . .). (emphasis added)

42 U.S.C. § 1437d(c)(4)(A), as it stood through 1996, mandated that PHAs fulfill three independent duties. First, under subsection (i), PHAs were required to allocate available housing units based on congressionally determined "preferences." Preferences were given, for example, to the homeless, to those paying more than 50% of their income in rent, and to those who had recently been displaced from housing.

Second, under § 1437d(c)(4)(A)(iii), an individual or family otherwise eligible for preferential placement in available housing was disqualified from receiving a preference for a period of three years if evicted from public housing because of drug-related criminal activity.

Finally, the final clause of § 1437d(c)(4)(A)(iii) specifically required that local PHAs waive the three year disqualification period for those individuals who "clearly did not participate in and had no knowledge of such criminal activity." These provisions 1) established preferential tenant selection criteria; 2) disqualified those evicted because of drug activity from the established preferences for a period of three years; and 3) exempted from disqualification those evicted who "clearly did not participate in and had no knowledge of the criminal activity."

Thus, the statutory mandate imposed by § 1437d(c)(4)(A) required PHAs to differentiate two classes of tenants evicted from public housing for drug-related criminal activity. The first class, to repeat, consisted of those who participated in or had knowledge of the criminal activity. These individuals were disqualified from preferential placement in available public housing units for a period of three years. The second

class consisted of those individuals evicted for drug-related criminal activity who did not participate in or have knowledge of that activity. These individuals were eligible to receive preferential treatment if they satisfied one of the other criteria listed in § 1437d(c)(4)(A)(i).

The distinction, between evicted tenants who "participated in" or "had knowledge of" drug-related criminal activity and those who did not have such knowledge, makes sense only if an ignorant public housing tenant could be evicted for the drug-related criminal activity of their household members or guests. Were that not so, there would have been no need for Congress to write a statute specifically waiving the applicability of the three-year prohibition period to the ignorant tenant.

b. *21 U.S.C. § 881(a)(7) ("Forfeiture Statute")*

This statute, 21 U.S.C. § 881(a)(7), also supports a plain language interpretation of § 1437d(*l*)(6). It is a civil forfeiture statute that makes leasehold interests subject to forfeiture when used to commit drug-related crimes.[6] 21 U.S.C. § 881(a)(7) was amended *con-*

[6] 21 U.S.C. § 881(a)(7) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the

currently with the passage of § 1437d(*l*)(6) as part of the Anti-Drug Abuse Act of 1988. Section 881(a)(7) *specifically includes a knowledge requirement.* Under it, no property otherwise subject to forfeiture may be seized if the owner establishes that the property was used in drug-related criminal activity "without the knowledge or consent of that owner."

The canons of statutory interpretation provide: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress clearly perceived that *forfeitures* of leaseholds under 21 U.S.C. § 881(a)(7) were to function differently from *evictions* under 42 U.S.C. § 1437d(*l*)(6) and legislated different regimes to govern the two. Specifically, Congress recognized that the forfeiture statute permitted the government to seize property without providing any procedural protections to the owner of the property. 134 Cong. Rec. E1965-02 (1988) (use of seizure rather than eviction "cut[s] through the usual drawn-out process of first notifying the drug dealers that they would be evicted and then battling them in courts, sometimes for years, before they could be removed.") Owing to the lack of procedural protections, Congress recognized that additional substan-

> extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

tive protections are needed to prevent the use of this weapon against undeserving parties.

Similarly, in a 1989 emergency supplemental appropriations measure, Congress directed the Secretary of HUD to issue waivers of certain administrative grievance procedures "as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy." *Dire Emergency Supplemental Appropriations and Transfers*, Pub. L. No. 101-45, § 404, 103 Stat. 97 (1989). This measure, like the forfeiture statute, permits the taking of property without any pre-deprivation procedural protection. Congress, therefore, included a substantive protection for ignorant tenants. A similar substantive right, however, was not provided to tenants who received the full procedural protections offered by HUD and local PHAs.

Thus, the "innocent" owner exception in both 21 U.S.C. § 881(a)(7) and Pub. L. No. 101-45, § 404 reflected distinctly different congressional judgments about the proper tradeoff between procedural and substantive protections. Owners were provided substantive protections not available to tenants. Congress concluded that the forfeiture statute should not be applied to owners who did not know of or consent to the illegal use of their property. However, Congress did not afford innocent tenants the same protection. Congress determined that local PHAs should have greater discretion to evict than federal agents have to seize property of innocent owners used in drug-related criminal activity.

2. *Legislative History*

Having discounted the plain language of the statute, the majority next examines the scant legislative history of § 1437d(*l*)(6). This endeavor is both unnecessary, *see supra*, and unhelpful. Official legislative history consists almost entirely of a single statement in a 1990 Senate Report. The report reads in pertinent part:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316, at 179 (1990). Both parties make much of this statement. The government emphasizes the committee's deference to the PHA's "humane judgment," while the tenants rely on the suggestion that eviction of ignorant tenants "would not be the appropriate course."

The committee report should be read in a manner consistent with the language of the remainder of the statute and the purposes of the Act. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997) ("the specific context in which that language is used and the broader context of the statute as a whole" relevant to determining meaning of statutory language). It is a declared purpose of the United States Housing Act "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. § 1437

(Declaration of Policy).[7] Evidence exists that § 1437d(*l*)(6) was intended to further this purpose. During floor debate on the measure, one member of the House of Representatives commended the eviction provision as an "additional tool to enhance HUD's and the Nation's public housing managers' ability to deal with the problem of drugs in public housing." 134 Cong. Rec. 33,148 (1988) (statement of Rep. Wylie).

Read in the context of an unambiguous legislative declaration of policy, and its consistent implementation throughout the Act, the Senate committee report supports the proposition that Congress intended to provide local housing authorities with *wide* discretion to evict tenants connected with drug-related criminal behavior. By permitting the eviction of ignorant as well as knowledgeable tenants, Congress deferred to the judgment of local officials who would possess a more extensive understanding of the individualized circumstances. Any suggestion by the committee as to when eviction would or would not be appropriate is properly seen as just that—a suggestion. The language is precatory and the "humane judgment" of the local agencies should control.

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[7] This policy judgment is reflected throughout the Act. Local authorities, for example, have the responsibility to determine the public housing needs in their community. 42 U.S.C. § 1437c(e). *See also*, 42 U.S.C. § 1437d(c)(4)(A).

3. *Congress Failed to Amend § 1437d(l)(6) to Include an Innocent Owner Defense.*

Congressional treatment of § 1437d(*l*)(6) since its initial passage in 1988 makes clear that Congress meant what it said. Long before this litigation began, concerns about the eviction provision's applicability to ignorant tenants were expressed. In a 1989 congressional hearing, for example, the associate director of the American Civil Liberties Union (ACLU) argued that "PHAs should be restrained from imposing the sanction of eviction unless they can prove that a tenant had knowledge and actual control over the actions of a household member or third party." *Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 90-91 (1989). In that hearing, the ACLU brought to the attention of the committee several instances where ignorant tenants were subjected to eviction proceedings. S. Doc. No. 101-234, at 86-87; Davidson, *Public Housing Aides Push to Evict Drug Users, Sometimes Violating the Rights of other Tenants*, Wall St. J., Jul. 6, 1989 at A12. Congress did not respond favorably. Subsequent to this hearing, Congress amended the eviction provision, but failed to include an innocent owner exception. *National Affordable Housing Act*, Pub. L. 101-625, § 504, 104 Stat. 4079 (1990) (substituting provisions relating to criminal activity threatening health, safety or peaceful enjoyment of other tenants for provisions relating to criminal activity generally).

Likewise, as part of the notice and comment procedure necessary for implementing its regulations, HUD

received substantial criticism of the applicability of § 1437d(l)(6) to ignorant tenants. "Comment by legal aid and by tenant organizations . . . alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, . . . or if the tenant has done everything "reasonable" to control the criminal activity." 56 Fed. Reg. at 51,566 (1991). HUD nevertheless interpreted § 1437d(*l*)(6) to grant discretion to PHAs to evict ignorant tenants. 56 Fed. Reg. at 51,567.

Subsequent to these comments and subsequent to implementation of the HUD regulations, Congress once more amended the eviction statute—and again failed to include an innocent owner exemption.[8] These inactions of Congress are highly significant. "As a matter of statutory construction, we 'presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.'" *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185, 108 S. Ct. 1704, 100 L.Ed.2d 158 (1988)). In *Hunter*, this court presumed Congress was aware of judicial decisions interpreting a criminal statute when it amended that statute many years after its initial passage. "Accordingly, the only reasonable interpretation of Congress omission of language . . . is that Congress intended [the judicial interpretation to control]." *Hunter*, 101 F.3d at 85.

[8] In fact, in the 1996 amendment to § 1437d(*l*)(6), Congress expanded the provision such that an ignorant tenant could be evicted for drug-related criminal activity that took place "on or off" public housing premises, rather than simply "on or near" the premises as the legislation had previously read. Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836 (1996).

Likewise, in this instance, Congress was aware that the administrative agency charged with implementing the eviction provision construed it to permit eviction of ignorant tenants. This interpretation had been challenged on both policy and constitutional grounds before Congress and in HUD's notice and comment procedures. Congress itself has shown its concern for ignorant tenants by protecting them with specific language in *other* legislative enactments. *See supra.*[9] Congress, however, did not provide an exemption for ignorant tenants when it amended § 1437d(*l*)(6) in 1996. This court does not have the power to amend the statute. Congress clearly intended HUD's interpretation of the eviction statute to prevail.

II. Section 1437d(*l*)(6), Properly Interpreted, Does Not Conflict with 42 U.S.C. § 1437d(*l*)(1) Prohibiting Public Housing Leases that Contain Unreasonable Terms and Conditions.

Section 1437d(*l*)(6) is part of a comprehensive program of legislative initiatives aimed at the public housing drug crisis. *See Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, §§ 5101-5105 (1988); *Dire Emergency Supplemental Appropriations and Transfers*, Pub. L. No. 101-45, § 404 (1989); 42 U.S.C. § 1437d(c)(4)(A) (1990). The district court held that one aspect of the legislative response was "unreasonable"

[9] 21 U.S.C. § 881(a)(7) protects owners from forfeiture when they did not know nor consent to the illegal use of their property. 42 U.S.C. § 1437d(c)(4)(a)(iii) protected ignorant public housing tenants from disqualification from future placement. Pub. L. No. 101-45, § 404 provided ignorant tenants with additional procedural protections not available to those tenants who were aware of the drug-related criminal activity of their guests.

because it was "on its face . . . irrational." The majority opinion echoes this holding. Both the district court and the majority misconceive the rationale behind the law and ignore a considered policy judgment on the part of Congress. Section 1437d(*l*)(6) *permits*, but does not mandate, eviction for all tenants whose household members or guests engage in drug-related criminal activity. It grants discretion to PHAs to make this determination on a case-by-case basis. This was a reasonable decision on the part of Congress.

Local PHAs, it must be remembered, operate "with tax funds provided from federal as well as from state sources. The State . . . has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman v. James*, 400 U.S. 309, 318-19, 91 S. Ct. 381, 27 L.Ed.2d 408 (1971). The district court properly defined a reasonable lease term:

> The lease term must be rationally related to a legitimate housing purpose. In applying this term, the crucible of reasonableness will be defined by the particular problems and concern confronting the local housing authority. Lease provisions which are arbitrary and capricious, or excessively overbroad or under-inclusive, will be invalidated.

citing *Richmond Tenants Org., Inc. v. Richmond Redevelopment and Hous. Auth.*, 751 F. Supp. 1204, 1205-06 (E.D. Va. 1990).

Congress confronted two interrelated problems when it passed § 1437d(*l*)(6) permitting the eviction of ignorant tenants. First, it faced increasing drug related

crime in the nation's public housing. Ample testimony before Congress demonstrated that drug use had rendered many public housing complexes unsafe and, in several instances, unlivable. 42 U.S.C. § 11901(3) ("drug dealers are increasingly imposing a reign of terror on public and other federally assisted low income housing tenants.")[10] Second, Congress was confronted with increasing and understandable reluctance on the part of public housing tenants to cooperate with efforts of local PHAs to address the drug problem. "Our inability to get pushers out of the buildings rapidly enough has caused tenants to think the Housing Authority has been working against them rather than with them." 134 Cong. Rec. E1965-02 (June 14, 1988). Housing authorities were increasingly seen as "paper tigers" unable or unwilling to take decisive action against drug use in public housing. 134 Cong. Rec. at E1965-02.

The ignorant tenant eviction provision rationally addresses both of these concerns. The power to evict an unknowing tenant provides the PHA with a credible deterrent against criminal activity. To require proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical. Proper authorities would seldom, if ever, discover the tenant seated with

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[10] One resident of public housing described living conditions in the following terms.

> "At night, when people are trying to rest, hallways are being used [for smoking crack], stairwells are being slept in, elevators are being mutilated with people using them for personal bathrooms. . . . There is crack being sold openly."

Just Saying No is not Enough: HUD's Inadequate Response to the Drug Crisis in Public Housing, H.R. Rep. No. 100-702, at 4 (1988).

the drug using guest or while the latter engaged in other drug-related criminal acts. Absent this rare factual situation, the housing authority would be forced to rely on evidence consisting of hearsay, gossip and rumor. Moreover, the lengthy public housing eviction procedure permits a culpable tenant to intimidate or threaten potential witnesses. "When suspected drug dealers were notified that eviction proceedings against them had been started, they sought to punish tenants who might have identified them." 134 Cong. Rec. E1965-02. These tactics against housing tenants have furthered the public housing drug epidemic.

In this case, for example, members of plaintiffs' household engaged in drug-related criminal activity outside the tenant's apartment.[11] Since the tenant was not with the drug-user at the time of detection, evidence that the tenant knew of the drug related criminal activity must come from either the tenant, the drug user, or other residents. Only the latter, if available, would be a reliable source of such information. For obvious reasons, PHAs will rarely secure statements from either the drug user or the tenant.

Based on substantial and credible evidence, Congress concluded that other residents were equally unlikely to present the necessary testimony. "Tenants are frightened. They are scared for themselves and their children. They are afraid to report drug incidents to the PHA management and to the police because usually nothing is done by either agency." *The Drug Problem and Public Housing: Hearings Before the House Select*

[11] Mr. Walker's guest was found in possession of drugs inside of Walker's apartment.

Comm. on Narcotics Abuse and Control, H.R. Rep. No. 101-1019, at 66 (1989) (summary of testimony of Nancy Brown, Chairperson, State of Connecticut Task Force on Public Housing and Drugs); "The fear of retaliation makes it almost impossible to provide normal police protection." H.R. Rep. No. 101-1019, at 69 (summary of testimony of Vincent Lane, Chairman, Chicago Housing Authority).

By granting PHAs the authority to evict tenants without proving the tenant knew of the drug-related criminal activity, Congress passed reasonable legislation designed to address these well-documented obstacles to effective law enforcement. Residents of public housing are empowered by § 1437d(*l*)(6) to monitor and report drug activity without fearing the possibility of retaliation. This will reduce the need for residents to confront drug dealers in court in order to prove the tenant knew of the drug-related criminal activity and secure their eviction. "Once tenants realize that they can rejoin the fight against drug dealers without fear of retaliation, we will have achieved an important victory." 134 Cong. Rec. E1965-02 (article written by Emmanuel P. Popolizio, Chairman, New York City Housing Authority).

Much of the public housing drug eradication program was aimed at obtaining the cooperation and support of public housing tenants. HUD Secretary Jack Kemp, for example, recommended that PHAs establish anonymous 'drug tip' hotlines "so that residents can anonymously report drug activity in their area." H.R. Rep. No. 101-1019, at 64 (testimony of Jack Kemp, Secretary of HUD). Like the anonymous hotline, § 1437d(*l*)(6) was a reasonable response to the legitimate housing

objective of reestablishing tenant control of drug-ridden public housing units. Mayor James P. Moran Jr. of Alexandria, Virginia argued before a Senate subcommittee that the eviction provision was critical to "giv[ing] a sense of control back to the tenant leadership within the communities." *Drugs in Federally Assisted Housing: Hearings on S. 566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 27 (1989).

Furthermore, a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants. *Shepard v. Dye*, 137 Wash. 180, 242 P. 381 (1926) (eviction upheld even though lessee neither knew of nor consented to the gambling activity engaged in by sublessee); *Minnesota Public Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (1999) ("A lease is a form of contract. Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." [citations omitted]); 56 Fed. Reg. at 51,566 (Oct. 11, 1991) (The "ability of PHA or other landlord to enforce covenants relating to acts of unit residents . . . is a normal and ordinary incident of tenancy.") The regular use and enforcement of these provisions among private parties attests to their reasonableness.

The fact that one of the parties to this particular lease was a government agency does not render an

otherwise prudent provision unreasonable.[12] Frequently, governments impose liability on individuals without requiring that the individual had actual knowledge of the wrongdoing. *See* Conn. Gen. Stat. § 52-572 (imposing tort liability on "ignorant" parents for actions of their children); 42 U.S.C. § 9607 (property owner liable for environmental cleanup when waste was legally deposited by a previous owner without current owner's knowledge or consent).

Thus, it must be acknowledged that the congressional imposition of liability without fault on individuals is not, per se, unreasonable. Such liability, furthermore, is frequently negotiated between private landlords and tenants. Congress, by enacting § 1437d(*l*)(6), determined that the safety and security of public housing tenants justified the potential eviction of ignorant tenants. *Housing Lease and Grievance Procedures*, 56 Fed. Reg. at 51,567 ("Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents warranting special mention in the law.") This determination was entirely reasonable.

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[12] Whether the lease provision is "reasonable" within the meaning of § 1437d(*l*)(1) is a separate question from whether the constitution permits the government to include it in every public housing lease. We deal with the constitutional questions below.

III. The Constitution Does Not Prohibit the Eviction of Ignorant Tenants from Federally Subsidized Housing.

Section 1437d(*l*)(6) is not proscribed by the Constitution. In evicting Walker, Lee and Hill[13] for the actions of their household members and guests, the Oakland Housing Authority was exercising its right to terminate tenancy because of a violation of the lease. As noted above, this is not an unusual provision.[14] The fact that the landlord in this case was a government agency should not transform an otherwise proper eviction into a constitutional question.

A. *Constitutional Doubt*

The majority does not reach the constitutional issues raised by the tenants in this case. Rather, applying the doctrine of "constitutional doubt," the majority instead imposes its own construction on the statute. The majority, however, has misapplied this doctrine. "The 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998). The doctrine is to be applied only when 1) the statute is "genuinely susceptible to two constructions" and 2) there is a "serious likelihood" that the statute will be held unconstitutional. *Id.* at 238, 118 S. Ct. 1219; *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L.Ed. 1061 (1916) (Holmes, J.) (statute must be construed so as to avoid "grave doubts" as to its constitutionality). We have already articulated the reasons we do not believe the statute is susceptible to multiple interpretations. We would also hold that the statute, as written by Congress and implemented by HUD, is constitutional.

[13] In an exercise of its "humane judgment," the OHA has decided not to seek the eviction of plaintiff Rucker.

[14] "Were we dealing with the same lease provision in a lease between private parties we could have affirmed the [eviction] in one short paragraph relying solely on the lease provision." *Hous. Auth. of New Orleans v. Green*, 657 So.2d 552, 555 (La. App. 1995).

B. *Due Process*

Government plays many parts. When it acts in one of its many proprietary roles (employer, purchaser, or landlord, to name a few), it must be able to enforce reasonable and germane conditions. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588, 118 S. Ct. 2168, 141 L.Ed.2d 500 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation . . . or a criminal penalty at stake.") A government employer, for example, may impose restraints on employee speech that would violate the First Amendment if imposed on an ordinary citizen. *Pickering v. Bd. of Educ. Of Township High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968) (applying intermediate rather than strict scrutiny to dismissal of public school teacher for exercising First Amendment rights). Likewise, when the government acts to subsidize a purchase of certain services but not others, there may be no constitutional implications. *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977) (subsidizing childbirth, but not abortion "does not interfere" with a fundamental right, but merely "encourages" childbirth).

When managing a public housing complex, the government's role is not unlike that of an employer or purchaser. The constitution does not require the government to provide decent and safe housing to its citizens. *Lindsey*, 405 U.S. at 74, 92 S. Ct. 862 (there is no "constitutional guarantee of access to dwellings of a particular quality.") The rights provided in the Housing Act of 1937 and its subsequent amendments arise from congressional notions of sound policy not constitutional necessity. In furtherance of such policy, Congress should be accorded considerable flexibility in fixing the necessary rules with which beneficiaries must comply.

In this case, Congress has limited the right to reside in public housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests. It has granted to PHAs the authority to withdraw this benefit from those who will not or cannot prevent their guests from engaging in such activity. So long as this condition is relevant to the government's underlying interest as a landlord, it is constitutionally permissible. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) (if governmental purpose is sufficient to justify outright refusal of benefit, it is sufficient to justify conditions on that benefit). *See also Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970).

In *Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, UAW* ("*UAW*"), 485 U.S. 360, 108 S. Ct. 1184, 99 L.Ed.2d 380 (1988), the Supreme Court upheld the denial of food stamps to an entire household because a single member of that household was on strike. Like the tenants in the

present case, the appellees in *UAW* argued that the statute unconstitutionally burdened the right to association because it "impermissibly directs the onus of the striker's actions against the rest of the family." *UAW*, 485 U.S. at 363, 108 S. Ct. 1184.

The denial of food stamps undoubtedly imposed a hardship on "innocent" family members. So long as non-striking family members continued to share their household with a striker, they were prohibited from enjoying a government benefit to which they were otherwise entitled. Although the Court recognized that associational rights were implicated by the food stamp statute, it held that the "withdrawal of a government benefit" did not pose a significant danger to the exercise of that constitutional right. *Id.* at 367 n.5, 108 S. Ct. 1184.

In *UAW*, the Court also acknowledged that the means used by Congress in addressing this objective were imperfect because the "statute works at least some discrimination against strikers and their households." *Id.* at 371-72, 108 S. Ct. 1184 ("in terms of the scope and extent of their ineligibility for food stamps, § 109 is harder on strikers than voluntary quitters.") Nevertheless, the Court deferred to the congressional view of "what constitutes wise economic or social policy" and upheld the statute. *Id.* at 372, 108 S. Ct. 1184 (quoting *Dandridge v. Williams*, 397 U.S. at 486, 90 S. Ct. 1153.)

Similarly, in *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) (en banc), this court upheld a state's foster care funding scheme against a constitutional challenge. The court noted that it must defer to the legislatively determined allocation of scarce child care

subsidies. "Because Oregon has no affirmative obligation to fund plaintiffs' exercise of a right to maintain family relationships free from governmental interference, we decline to apply heightened scrutiny." *Lipscomb*, 962 F.2d at 1379. Because the allocation of welfare payments is a legislative function, a court may not strike down such schemes on the basis of "seemingly arbitrary consequences in some individual cases." *Id.* at 1382 (quoting *Califano v. Jobst*, 434 U.S. 47, 53, 98 S. Ct. 95, 54 L.Ed.2d 228 (1977)). Rather, when confronted with a facial challenge to a statutory determination of eligibility, the *Lipscomb* court limited its inquiry to "only whether there is a rational basis for the program viewed as a whole." *Id.* Consequently, despite the potential for "unfavorable results in the cases of individual plaintiff[s]," the statutory scheme was constitutional because it was rationally related to the government's interest in "maximizing the amount of money available" for the program as a whole. *Id.* at 1380, 1381.

In this case, the government has interrelated interests. Both reclaiming public housing from an epidemic of drug related crime and violence and empowering public housing residents to assist in this effort are indisputably legitimate objectives. The failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny. In determining who may reside in federally subsidized housing, Congress must draw distinctions "in order to make allocations from a finite pool of resources." *UAW*, 485 U.S. at 373, 108 S. Ct. 1184. *See also Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381, 27 L.Ed.2d 408 (1971) (holding that the government may condition welfare payments

on a recipients agreement to permit warrantless homevisits by agency personnel).

Section 1437d(*l*)(6) facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity. Because the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction. *HUD, One Strike and Your Out Policy in Public Housing*, 8 (March 1996).[15] The statute is, therefore, rationally related to Congress' legitimate objectives. No more is required. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 491, 97 S. Ct. 1898, 52 L.Ed.2d 513 (1977) (statute that "provides only rough justice . . . is [nevertheless] far from irrational.")

The majority opinion ignores the discretionary nature of the benefit at issue and instead focuses on the property rights of those who currently reside in federally subsidized housing. The majority finds "grave doubt" as to the constitutionality of 1437d(*l*)(6) because the statute authorizes eviction "without any relationship to individual wrongdoing." The majority's analysis flounders, however, because the Supreme Court has repeatedly held that "the innocence of the owner of property subject to forfeiture has almost uniformly

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[15] Even though the "one strike" policy was implemented eight years after the passage of § 1437d(*l*)(6) it still may offer a legitimate rationale for the passage of the statute. *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1494 (9th Cir. 1993) ("A rational basis need not be one that actually motivated Congress. It is enough that plausible reasons for Congress' action exist." [citations omitted])

been rejected as a defense." *Bennis v. Michigan*, 516 U.S. 442, 449, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974)); *See also, J.W. Goldsmith, Jr. Grant Co. v. United States*, 254 U.S. 505, 41 S. Ct. 189, 65 L.Ed. 376 (1921); *Van Oster v. Kansas*, 272 U.S. 465, 47 S. Ct. 133, 71 L.Ed. 354 (1926).

The majority argues that this unbroken line of authority is factually distinguishable from the present case. Specifically, the majority hangs its constitutional argument on the fact that two tenants face eviction for drug related criminal activity that took place on public housing premises but not in the tenant's apartment. This is a thin reed on which to hang "grave doubts" as to the constitutionality of § 1437d(*l*)(6). The "cases authorizing [forfeiture of the property of innocent owners] are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'" *Bennis*, 516 U.S. at 452, 116 S. Ct. 994. (quoting *Goldsmith-Grant*, 254 U.S. at 511, 41 S. Ct. 189). The facts of this case present no reason to create a new constitutional rule. Those who engaged in drug-related criminal activity were on the premises with the consent of the tenants. No additional nexus among the tenant, property, and the drug use is constitutionally required.

C. *Excessive Fines*

The tenants' contention that the lease provision permitting eviction of ignorant tenants is an excessive fine proscribed by the Eighth Amendment is without

merit.[16] No court has held that government enforcement of a valid lease provision constitutes an excessive fine. To do so would be to "federalize the substantive law of landlord-tenant relations." *Lindsey*, 405 U.S. at 68, 92 S. Ct. 862. Excessive fines analysis is limited to those circumstances where "the government . . . extracts payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S. Ct. 2028, 141 L.Ed.2d 314 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609-610, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993)).

The eviction of a tenant for violation of a valid lease provision is distinguishable from a cash payment to the government. In *Kim v. United States*, 121 F.3d 1269 (9th Cir. 1997), a grocery store owner sought review of his permanent disqualification from participation in the federal food stamp program. The basis for the disqualification was that an employee—without plaintiff's knowledge or consent—illegally exchanged cash for food stamps. *Id.* at 1271. The owner insisted that permanent disqualification constituted an excessive fine in that there was no evidence of individual wrongdoing on his part. The court rejected this argument. "Permanent disqualification . . . is not an excessive fine prohibited by the Eighth Amendment because it is not cash or in kind payment directly imposed by, and payable to, the government." *Id.* at 1276.

Eviction from publicly subsidized housing is comparable. Eviction is the return of a possessory right to its

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[16] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., amend. 8.

original owner, the government. The government then transfers the possessory right to another citizen under the same conditions as it was held by the original tenant. The purpose behind the excessive fines clause—to limit the government's power to enrich itself by punishing its citizens—is absent in the case of eviction from public housing. *See Browning-Ferris Industries of Vt. Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-268, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989). Evictions cannot properly be characterized as "cash or in kind payments" and should not be subject to excessive fines analysis.

Moreover, evictions in these circumstances are not punitive. They are remedial. A civil sanction is punitive when it serves "either retributive or deterrent purposes." *Austin*, 509 U.S. at 610, 113 S. Ct. 2801. Eviction serves the classic purpose of a contractual remedy—it returns the parties to "as good a position as that occupied . . . before the contract was made." *Corbin on Contracts* § 996. The remedy of eviction alone is not punitive. Therefore, the Eighth Amendment prohibition of excessive fines is inapplicable in this case.

IV. The ADA Does Not Prevent the Eviction of Mr. Walker.

In addition to the statutory and constitutional claims raised by all tenants, one tenant, Mr. Walker, raises an additional claim under the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12101, *et seq.* Walker argues that the ADA prevents his eviction despite the fact that his caretaker and other guests engaged in drug-related criminal activity in his apartment and on the premises on at least three occasions.

The district court enjoined the unlawful detainer proceedings against Walker. The court held that the eviction provision of the lease placed Walker "at more risk for forfeiture of his tenancy than other tenants who do not require in home care." While non-disabled tenants can comply with the lease provision simply by "choosing not to have any household members or guests," Mr. Walker—because of his disability—does not have that choice. He requires an in home caretaker. Consequently, the district court concluded that the ADA may require the OHA to provide some accommodation exempting Walker from responsibility for the drug-related criminal activity of his caretaker.

The district court erred, however, because the OHA did not seek to evict Mr. Walker based solely on the drug-related criminal activity of his caretaker. Whether there is a "reasonable accommodation" that would permit Mr. Walker to engage the services of a drug-using caretaker without risk of eviction was not presented by the facts of this case. Consequently, although the district court applied the appropriate standard to a request for preliminary relief, it "misapprehend[ed] the law with respect to the underlying issues in litigation." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (1982). This constitutes reversible legal error.

The unlawful detainer complaint against Mr. Walker alleged three separate incidents of drug-related criminal activity in Mr. Walker's apartment and/or by his guests. Only one of those incidents involved Mr. Walker's caretaker. On August 7, 1997, the OHA contends that it stopped and searched a guest of Mr. Walker on OHA premises. The guest was in possession

of crack cocaine. Mr. Walker does not claim that this guest was employed as his caretaker. After arresting Walker's guest, officers went to Walker's unit where Walker consented to a search. There officers met Eleanor Randle. Ms. Randle had a cocaine pipe pinned inside her jacket. She was arrested for possession of narcotics paraphernalia. Mr. Walker alleges that Ms. Randle is his caretaker. Officers also found a cardboard box containing crack cocaine pipes and "suspected rock cocaine chips." OHA did not ascertain the ownership of these drugs found in Walker's apartment. Mr. Walker denied knowledge of all criminal drug activity that took place in his apartment.

On August 12, 1997 officers found a cocaine pipe inside a bag of hair rollers inside Walker's apartment. Walker's alleged caretaker, Eleanor Randle, was not present at the time, although another guest was.

On October 11, 1997 officers again found a cocaine pipe in Walker's apartment. Walker's guest at the time was cited for possession of narcotics paraphernalia. Walker does not allege that this guest was his careaker.

Under § 1437d(*l*)(6) any one of these incidents, if proven, is sufficient justification for Mr. Walker's eviction. Under the district court's reasoning, Mr. Walker requires a "reasonable accommodation" only because he cannot, like a non-disabled resident, choose not to have guests. He must permit a caretaker to enter his apartment. This reasoning cannot sustain an accommodation that exempts Walker from eviction for the drug-related criminal activity of non-caretaker guests. There are two alleged incidents of such conduct.

On appeal of a preliminary injunction, we do not accept the housing authority's allegations as true. The accuracy of these allegations should be determined through the normal adjudication of the pending unlawful detainer action. We only believe that even assuming Mr. Walker is disabled and assuming that a reasonable accommodation could be found that would prevent the eviction of Mr. Walker because of the drug-related criminal activity of his caretaker, Mr. Walker could still be evicted based on the drug possession of his other guests who were not his caretakers. Mr. Walker's ADA claim should therefore be rejected.[17]

CONCLUSION

It is obvious that when Congress authorized the eviction of innocent tenants, the potential for individual unfairness existed. Congress granted to local PHA's the power to evict and trusted that the "humane judgment" of PHA officials and the procedural protections of the Act would prevent the abuse of this power. Congress struck a balance. It did so in the face of a drug crisis and the ineffectiveness of traditional law enforcement. It bestowed upon the PHAs the authority challenged in this case. That authority does not violate the Constitution. This legislation should be interpreted as it was written.

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[17] We also note that the OHA did accommodate Mr. Walker by not attempting to evict him until after the third drug-related criminal offense committed by one of his guests. OHA is not required by the ADA to provide Walker with an accommodation that is not reasonable. *Memmer v. Marin County Courts*, 169 F.3d 630, 633-634 (9th Cir. 1999). A request to waive applicability of § 1437d(*l*)(6) to a tenant's caretaker is not reasonable.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322, 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT

Filed Aug. 18, 2000

Before: HUG, Chief Judge.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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[1] Judges Wardlaw and Fisher were recused.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322, 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLANT

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY, DEFENDANTS-APPELLANTS

AND

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT

Filed Feb. 14, 2000

Before: SNEED, O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge W. FLETCHER.

O'SCANNLAIN, Circuit Judge:

We must decide whether a local public housing agency may evict a tenant on the basis of drug-related criminal activity engaged in by a household member on or near the premises regardless of whether the tenant was personally aware of such activity.

I

Established in 1937, the first public housing program was intended to assist states and localities in providing affordable housing to low-income families. *See* Pub. L. No. 75-412, 50 Stat. 888 (1937). The Housing Act of 1937 vested responsibility for managing, maintaining, and operating public housing developments in local public housing agencies ("PHAs") rather than in the federal government. *See* 42 U.S.C. § 1437. Over 3,192 local PHAs currently oversee the 1,326,224 public housing units that are home to over 3 million people. *See* U.S. Dep't of Hous. & Urban Dev., *"One Strike and You're Out": Policy in Public Housing* 3 (1996); Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *A Picture of Subsidized Households, Volume 11, United States: Large Projects & Agencies* 14, 72 (1996); Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. Chi. L.Rev. 497, 499-522 (1993). In exchange for monetary assistance for the construction and operation of low-income housing, local PHAs agree to abide by federal regulations promulgated by the Department of Housing

and Urban Development ("HUD") under the United States Housing Act. *See generally* 42 U.S.C. § 1437 *et seq.*; *see also Hodge v. Department of Hous. & Urban Dev.*, 862 F.2d 859, 860-61 (11th Cir. 1989) (discussing the relationship between HUD and PHAs); *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 20 (1st Cir. 1991); *Thomas v. Chicago Hous. Auth.*, 919 F. Supp. 1159, 1163 (N.D. Ill. 1996).

Intended as a sanctuary for low-income families, *see* Office of Policy Dev. & Research, *supra*, at 72 (reporting that public housing residents have an average total household income of $8,500 per year), many public housing projects—primarily the larger ones located in urban areas—have been transformed into havens of crime, with severe and tragic social and physical distress resulting for residents and for the surrounding neighborhoods generally. *See* U.S. Dep't of Hous. & Urban Dev., *supra*, at 3; Schill, *supra*, at 500-01. A White House report states: "Public housing has become a staging area for the distribution of drugs and the violence related to drug trafficking and consumption." Office of Nat'l Drug Control Policy, Executive Office of the President, *National Drug Control Strategy* 64 (1991); *see also* D. Saffran, "Public Housing Safety Versus Tenants' Rights," 6 *The Responsive Community* 34-35 (Fall 1996) (discussing the problem of drugs and crime in public housing).

In 1988, Congress took decisive steps towards improving living conditions in public housing, attacking the problem of drugs and crimes, in particular, in the Anti-Drug Abuse Act of 1988. Beginning with the premise that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal

drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime," 42 U.S.C. § 11901(1)-(2),[1] Congress sought to create an effective and efficient mechanism for ridding public housing of those who sell or use drugs. More specifically, Congress required that:

> Each public housing agency shall utilize leases which—
>
> . . . . .
>
> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

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[1] Congress made three other related findings:

> The Congress finds that—
>
> . . . . .
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities. . . .

Id. § 11901(3)-(5).

42 U.S.C. § 1437d(*l*)(5) (1989).[2] In 1990 and in 1996, Congress altered the language of the statute, but left its effect unchanged in relevant part:

> Each public housing agency shall utilize leases which-
>
> . . . . .
>
> (5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. . . .

Id. § 1437d(*l*)(5) (1991). Congress amended this statute further in 1996, replacing the phrase "on or near such premises" with "on or off such premises." *Id.* (1997).[3]

In 1991, HUD issued regulations implementing section 1437d(*l*)(5). One such regulation, 24 C.F.R. § 966.4(f)(12)(i)(B), provides:

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[2] The term "drug-related criminal activity" was defined as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of Title 21)." *Id.* § 1437d(*l*).

[3] In 1998, section 1437d(*l*)(5) was redesignated as subsection (*l*) (6), but the language was left unchanged. We will continue to refer to this provision as (*l*)(5).

> § 966.4 Lease requirements.
>
> A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.
>
> . . . . .
>
> (f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated:
>
> . . . . .
>
> (12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> . . . . .
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i)(B). Another regulation similarly provides:

> Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
>
> . . . . .
>
> (B) Any drug-related criminal activity on or near such premises.

Id. § 966.4(*l*)(2)(ii)(B).

In formulating these regulations, HUD considered comment by legal aid and by tenant organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household" and "that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant did everything 'reasonable' to control the criminal activity." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Ultimately, however, HUD decided not to accept these suggestions, instead choosing to grant local PHAs the discretion to evict a tenant whose household members or guests use or sell drugs on or near the public housing premises regardless of whether the tenant knew or should have known of such activity. *See id.* at 51566-67. HUD stated quite explicitly: "The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." *Id.* at 51567.

HUD offered several reasons for its decision. First, the "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." *Id.* at 51567. Second, HUD feared that allowing a tenant to escape eviction by claiming a lack of knowledge "would allow a variety

of excuses for a tenant's failure to prevent criminal activity by household members" and "would thereby undercut the tenant's motivation to prevent criminal activity by household members." *Id.* Third, PHAs may often have difficulty proving in court that the leaseholder had knowledge or control over the offending person, thus making it time-consuming, costly, and otherwise cumbersome to evict households causing drug-related problems in public housing. *See id.* Finally, HUD noted that "a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." *Id.*

Importantly to this case, although HUD unequivocally *authorizes* eviction whenever a household member or guest sells or uses drugs on or near the apartment premises, it does not *mandate* or even encourage across-the-board evictions whenever there is cause to evict. Instead, its regulations recognize the importance of giving each case individualized consideration in light of the equities of the tenant's particular situation and examining whether some remedial measure other than eviction of the tenant may be appropriate even when there is clearly cause to evict the tenant. *See infra* Part IV-C; 24 C.F.R. § 966.4(*l*)(5)(i).

II

Pursuant to section 1437d(*l*)(5) and HUD regulations, the Oakland Housing Authority ("OHA") includes in its leases a provision obligating tenants to "assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the

premises (e.g., manufacture, sale, distribution, use, possession of illegal drugs or drug paraphernalia, etc.)." It is this lease provision—which OHA interprets as authorizing the eviction of a tenant on the basis of a household member's or guest's drug-related criminal activity regardless of whether the tenant knew or reasonably should have known of such activity—that has given rise to the present controversy.

OHA commenced separate unlawful detainer actions in the Alameda County Municipal Court against Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker (collectively "Tenants") after discovering a household member or guest of each Tenant engaging in drug-related criminal activity on or near the public housing premises. The relevant facts regarding the first three Tenants are quite similar. Rucker's daughter was found in possession of cocaine and drug paraphernalia three blocks from Rucker's apartment. Lee's grandson was caught using marijuana in the housing development's parking lot, as was Hill's grandson. All three Tenants claim to have been unaware of their household member's drug-related criminal activity.

The fourth Tenant, Walker, presents a somewhat different case. Walker is partially paralyzed and incapable of living independently. OHA served him with a notice of termination of tenancy after the third instance in which drugs or drug paraphernalia were found in his apartment. On the first occasion, officers found cocaine chips and cocaine pipes in Walker's bedroom as well as a cocaine pipe in the jacket of Eleanor Randle, Walker's care-giver.[4] Randle was arrested for possession of nar-

[4] Walker consented to this search, as well as to the subsequent searches.

cotics paraphernalia, and OHA issued Walker a lease violation notice. OHA officers and the housing manager conducted a follow-up check of Walker's apartment five days later and found another rock cocaine pipe, at which point Walker was issued another lease violation notice. Two months later, drug paraphernalia was found in Walker's apartment yet again. In addition to issuing a third lease violation notice, OHA served Walker with a notice of termination and initiated an unlawful detainer action after he refused to vacate. It was not until after Walker received his third lease violation notice that he fired his drug-using care-giver.

In response to OHA's unlawful detainer actions, Tenants filed the present action in the United States District Court for the District of Northern California against HUD, OHA, and OHA's director Harold Davis in December 1997. Tenants argued that 42 U.S.C. § 1437d(*l*)(5) does not authorize the eviction of what they termed an "innocent tenant"—namely, a tenant who did not know of and had no reason to know of a household member's or guest's drug dealing or drug use. Tenants argued further that, if it does, the statute is unconstitutional. In addition, Walker alleged that his eviction would violate Title II of the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. § 12132, *et seq.*[5]

[5] Rucker also presented an ADA claim, which the district court dismissed because she did not allege a disability. Rucker does not appeal this ruling, so only Walker's ADA claim is before us.

Tenants sought a preliminary injunction against their eviction, and the parties agreed to stay Lee's, Hill's, and Walker's state court proceedings pending the resolution of the present case.[6] "To obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989). The district court concluded that Tenants had established a "fair chance of success" on their claim that HUD's interpretation of section 1437d(*l*)(5) was inconsistent with the statute itself and thus violated the Administrative Procedure Act ("APA"), *see* 5 U.S.C. §§ 701-706. The court determined further that HUD's interpretation raised substantial concerns with respect to Tenants' First Amendment right to freedom of association. Finding that the balance of hardships tipped decisively in Tenants' favor, the district court preliminarily enjoined the eviction of any public housing tenant for "drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, or have reason to know of, the drug-related criminal activity."[7] HUD, OHA, and Davis appeal this injunction.

In addition, the district court held that Walker had established a fair chance of success on his ADA claim, reasoning that, because Walker's disability prevents

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6 The unlawful detainer action against Rucker was dismissed in February 1998. Rucker continues to reside in OHA housing.

7 In addition, the court specifically enjoined OHA from prosecuting its state court eviction proceedings against Hill, Lee, and Walker.

him from living without a care-giver, he is at greater risk for termination of tenancy than tenants who do not require in-home care. Finding that the balance of hardships weighed in Walker's favor, the court enjoined OHA from evicting Walker on the basis of his care-giver's drug-related criminal activities. OHA and Davis appeal this ruling.

III

Before turning to the merits, a word on the standard of review is in order. We review the district court's grant of preliminary injunctive relief for an abuse of discretion. *See Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1045-46 (9th Cir. 1999). Because a district court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law, however, we review the legal issues underlying a preliminary injunction de novo and may rule on the merits of the controversy if legal issues are dispositive. *See, e.g., id.* at 1046 (citing cases); *Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996); *see also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757, 106 S. Ct. 2169, 90 L.Ed.2d 779 (1986), *overruled in part on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992); *Planned Parenthood v. Camblos*, 155 F.3d 352, 359-60 (4th Cir. 1998), cert. denied, 525 U.S. 1140, 119 S. Ct. 1031, 143 L.Ed.2d 40 (1999).

IV

The first question before us is whether HUD in its applicable regulations has adopted a permissible interpretation of 42 U.S.C. § 1437d(*l*)(5), or, more precisely, whether HUD's interpretation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The parties agree that we resolve this issue by applying the familiar framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). *Chevron* instructs us to begin our analysis by determining whether "Congress has directly spoken to the precise question at issue." *Id.* at 842-43, 104 S. Ct. 2778. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If, and only if, the language is silent or ambiguous on the precise question at hand do we proceed to step two, which is to defer to the agency unless its interpretation is arbitrary or capricious. See *id.* at 842-43 & n.9, 104 S. Ct. 2778; *see also Young v. Community Nutrition Inst.*, 476 U.S. 974, 981, 106 S. Ct. 2360, 90 L.Ed.2d 959 (1986) ("This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency]." (internal quotation marks and citation omitted)); *Jang v. Reno*, 113 F.3d 1074, 1076 (9th Cir. 1997).

HUD argues that section 1437d(*l*)(5) and the broader statutory context evince a clear congressional intent authorizing the eviction of any tenant whose household member or guest engages in drug-related criminal activity on or near the public housing premises even if the tenant did not know of such activity. Tenants maintain that the unambiguously expressed intent of Congress is to the contrary. The district court disagreed with both and instead concluded that the public housing lease statute is silent with respect to the issue before us.

In adjudicating among these conflicting views, we look to traditional tools of statutory construction for guidance. *See Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. 2778. More specifically, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997).

A

We begin, as we must, with the express language of the statute. "Where there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. 1, 8, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96, 5 L.Ed. 37 (1820)). Section 1437d(*l*)(5), as amended, provides that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(5). The plain statutory language thus makes clear that Congress

intended that there be cause for termination of tenancy when three conditions are met: there is (1) drug-related criminal activity, (2) on or off the public housing premises, (3) engaged in by the tenant, any household member, or any guest or other person under the tenant's control.

That each of Tenants' cases involved *drug-related criminal activity* as defined in section 1437d is not contested; similarly undisputed is the fact that the conduct in question occurred *on or near the public housing premises*. The only real dispute concerns the third prong—whether the activity was engaged in by "a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." *Id.*

Focusing on the statutory term "control," Tenants argue that cause for termination exists only if the tenant could realistically exercise "control" over the drug-dealing or drug-using household member or guest. Where, for example, a teenage son rarely heeds his mother's instructions and is generally uncontrollable, Tenants contend that OHA lacks authority to evict the entire household on the basis of the son's conduct—even if he is selling drugs out of the apartment—because the mother does not have "control" over her son.

Applying basic principles of grammar, we conclude that this construction of the public housing lease statute is untenable. The clause at issue—"public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control"—includes three separate categories of people: (1) the tenant, (2) any household member, and (3) any guest or other person under the tenant's control. The

phrase "under the tenant's control" has no relationship whatsoever to either of the first two categories—tenant or household member.

With respect to the third category, implicit in the phrase "any guest or other person under the tenant's control" is that guests are *per se* under the tenant's control. "Control" is a legal concept; tenants have control over their guests. Just as a tenant cannot escape liability for damage to a neighbor's apartment caused by a drunken guest by arguing that the guest was drunk and thus out of control, a tenant cannot avoid the import of section 1437d(*l*)(5) by arguing that, because his guests are stronger than he, he could not physically prevent them from selling drugs in his apartment. *See, e.g., Housing Auth. v. Green*, 657 So.2d 552, 554 (La. Ct. App. 1995) ("[W]here . . . the lease refers to 'a guest or other person under the tenant's control' it means that the tenant 'controls' who has access to the premises. The lease makes the tenant responsible for the drug activities of those persons given access to the apartment by the tenant. 'Control' as used in the lease in no way implies that the tenant knew or should have known of the drug activity. . . .").

Because the conduct for which OHA is attempting to evict Tenants unquestionably was committed by a household member or a guest, we conclude that the third, and final, prong of section 1437d(*l*)(5) is satisfied as well. Accordingly, the plain statutory language authorizes the termination of Tenants' tenancy. More generally, the express statutory language—which, to repeat, provides that "[(1)] any drug-related criminal activity [(2)] on or off such premises, [(3)] engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the

tenant's control" is cause for eviction—evinces a clear congressional intent to authorize termination of tenancy regardless of whether the tenant was aware that his household member or guest was selling, manufacturing, distributing, or using drugs. Thus, the statute makes clear that even purportedly "innocent tenants" may be evicted.[5]

B

Notwithstanding the fact that the statute makes *any* drug-related criminal activity by a household member or guest cause for termination of tenancy, the district court concluded that section 1437d(*l*)(5) is silent as to whether Congress intended to authorize the eviction of "innocent tenants" because it fails to address explicitly the situation of "innocent tenants." In the district court's view, a statute contains a clearly expressed congressional intent on an issue only if it *explicitly* addresses that issue. The district court appears to have placed great emphasis on the fact that Congress could have provided, for example, that "any drug-related criminal activity by a household member or guest

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[5] Only a handful of other courts have addressed this precise issue, and they have reached conflicting conclusions. *Compare City of South San Francisco Hous. Auth. v. Guillory*, 41 Cal. App. 4th Supp. 13, 18-19 (Cal. App. Dep't Super. Ct. 1995) (concluding that "drug-related activity by any member of a tenant's household is cause *per se* for termination of the lease where . . . the housing authority receives federal funds"), *with Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 464 S.E.2d 68, 72 (1995) ("With no mention of personal fault, the statute and lease at issue in this case provide that criminal activity by a member of a tenant's household is cause for ending a tenancy. However, as noted above, the legislative history reveals a clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for a breach of the lease. . . .").

including that of which the tenant is unaware " or "any drug-related criminal activity by a household member or guest *regardless of the tenant's knowledge thereof*" is cause for eviction.

The district court's failure to appreciate the implications of Congress's use of the term "any" when it made "*any* drug-related criminal activity [by a tenant, household member, or guest] . . . cause for termination" does violence to the plain language rule. 42 U.S.C. § 1437d(*l*)(5) (emphasis added). A statute covering "any drug-related criminal activity" has the exact scope as one covering "any drug-related criminal activity *including that of which the tenant is unaware*" or "any drug-related criminal activity *regardless of the tenant's knowledge thereof*." These italicized hypothetical clauses are mere surplusage—they add nothing of substance. Just as section 1437d(*l*)(5) covers drug-related criminal activity on weekends even though the statute does not explicitly refer to "any drug-related criminal activity *including that which occurs on weekends*," the statute covers conduct that the tenant does not know of even though it does not explicitly refer to "any drug-related criminal activity *including that of which the tenant is unaware*." The hypothetical "including" clauses merely enumerate subsets of cases already covered by the statute as actually written.

We have no reason to think that Congress meant anything other than "any" when it used the term "any." "Read naturally, the word 'any' has an expansive meaning, that is, 'one of some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). We suppose that Congress could have included an

additional sentence stating "Yes, we really do mean '*any*.'" Even without such a statement, binding precedent instructs that, just as "no" means "no," "any" really does mean "any."[9]

Tenants marshal policy arguments why we should restrict the scope of "any." Even if were we to agree, we cannot avoid the fact that Tenants' interpretation contradicts the express statutory language. We can limit section 1437d(l) (5)'s scope as Tenants request only by reading into the statute words that Congress did not see fit to include. This we refuse to do. Indeed, we may not so alter the statute's effect. As judges, we are interpreters, not authors, of the law.

C

Notwithstanding the expansiveness of the statutory language, Tenants strenuously attack the propriety of evicting "innocent tenants" and claim that a monumental injustice will result from the wholesale eviction of any and all tenants who have a household member or guest who uses drugs. What Tenants either fail to recognize—or attempt to obscure—is that the question

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[9] The dissent argues that a broad reading of the term "any drug-related criminal activity" is untenable because it leads to "absurd result [s]." Dissenting Op. at 651. This argument might be more persuasive if not for the fact that other language within section 1437d(*l*)(5) places limits upon the otherwise expansive scope of "any drug-related criminal activity."

Although the dissent is correct to point out that the statute does not explicitly state what illegal drug-related activity constitutes cause for eviction, the relevance of such observation to this case is unclear. Any metaphysical ambiguity in the statutory language has no bearing on the task at hand: determining whether HUD's regulations constitute a permissible interpretation of section 1437d(*l*)(5).

of whether there is *cause* to evict is wholly separate from whether the PHA will actually evict. Section 1437d(*l*)(5) merely requires that local PHAs make drug-related criminal activity "cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(5). Where there is cause for termination, a PHA *may* evict, but it is *not required* to evict in all instances in which there is cause to do so.

The public housing lease statute, although it authorizes eviction in a broad range of cases, is notably silent as to when termination of tenancy is required. By structuring the statute in this way, Congress implicitly conveyed discretion to HUD and to PHAs to make termination decisions in individual cases. This discretion is consistent with the Housing Act's long-established statement that "[i]t is the policy of the United States . . . to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public." *Id.* § 1437(a)(1)(C); *see also Newbury Local Sch. Dist. Bd. of Educ. v. Geauga County Metro. Hous. Auth.*, 732 F.2d 505, 509 (6th Cir. 1984) (noting that the Housing Act is "structured to place the 'maximum amount of responsibility' of administration on the local public housing agencies"); *Gholston v. Housing Auth.*, 818 F.2d 776, 781 (11th Cir. 1987) ("[T]he Housing Act gives local housing authorities discretion to . . . manage the day-to-day affairs of the subsidized housing projects.").[10]

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[10] Congress recently reaffirmed its desire to leave discretion in the hands of PHAs when it enacted 42 U.S.C. § 13662. Like section 1437d(*l*)(5), section 13662 requires PHAs to include a lease provision that allows the PHA to terminate the tenancy of any household with a member whose drug use threatens the health or

Leaving individual eviction decisions to HUD and local PHAs makes much sense. Eviction is a drastic remedy, and individualized consideration of the equities in a particular tenant's case is appropriate. Difficult cases will inevitably arise. It would be exceedingly difficult to enumerate *a priori* which tenants should be evicted, and Congress did not attempt to do so. With respect to "innocent tenants," for example, some tenants are more "innocent" than others. Should a tenant whose son deals drugs at the public housing development unbeknownst to the tenant be evicted? What about a tenant whose grandson uses drugs in the parking lot unbeknownst to her?

These are difficult policy questions. We see arguments on both sides, but how we judges might weigh competing policy considerations is simply irrelevant. Congress entrusted these questions to HUD and to individual PHAs, not to the federal judiciary. Congress charged HUD, the agency generally responsible for regulating and overseeing public housing, with formulating general principles to guide eviction determinations; it assigned local PHAs the responsibility for deciding how to proceed in individual cases.

HUD has provided some general guidance for dealing with individual cases, but largely leaves eviction decisions to PHAs. Of particular relevance to the case at hand is 24 C.F.R. § 966.4(*l*)(5)(i):

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safety of others, but explicitly makes clear that a PHA may consider other factors in deciding whether actually to evict on this basis. *See* 42 U.S.C. § 13662.

> (5) *Eviction for criminal activity*-(i) *PHA discretion to consider circumstances.* In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

24 C.F.R. § 966.4(*l*)(5)(i). Quite sensibly, HUD does *not* advocate the eviction of all "innocent tenants," but instead counsels PHAs to handle cases on an individualized basis and to consider alternative remedies. This policy is further embodied in a HUD publication entitled *"One Strike and You're Out": Policy in Public Housing*:

> The lease language mandated by federal law imposes on tenants an affirmative obligation to assure that neither they nor any member of their household or guest or other person under their control will engage in prohibited drug-related or other criminal activities. PHAs can generally enforce this obligation by terminating leases and evicting entire households when a household member or guest commits a crime in violation of lease provisions. A promise is a promise. Where the tenant has pro-

> mised in a lease to ensure a crime-free household, the tenant is responsible for the household, regardless of whether he or she was personally engaged in the prohibited drug or other criminal activity.

PHAs retain the flexibility to handle these cases on an individualized basis, and they should exercise reasonable discretion in light of all of the relevant circumstances. In particular, when a tenant has taken all reasonable steps to prevent the criminal activity, eviction may not always be warranted or proper. To ensure both humane results and success in court, PHAs should undertake a case-by-case analysis before proceeding with eviction. If they do seek eviction, PHAs should be prepared to persuade a court that eviction is justified. In some instances, eviction of an entire household may not be appropriate as a means of protecting the health, safety and welfare of the public housing community. In others, alternative approaches may be appropriate, such as allowing a household to remain in occupancy on the condition that the offending member move and agree not to return. This latter approach does not always lead to effective long-term removal of the offending individual. PHAs, therefore, should consider the likelihood of success in each particular case and their ability under local law to take action if an agreement is violated. In some cases, trespass laws and restraining orders may also help to keep former residents away from remaining household members. Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urb. Dev., *supra*, at 8.[11]

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[11] Under section 1437d(*l*)(5) and the applicable HUD regulations, eviction of a household is not the only possible response to cases involving drug-related criminal activity; PHAs have the discretion to utilize a wide range of alternative remedies in such cases. In challenging HUD's interpretation of the statute, the dissent places significant emphasis upon the existence of such remedies. *See* Dissenting Op. at 652. That alternative remedies are available does not mean, of course, that they are the *only* options open to PHAs under the statute.

Leaving PHAs with discretion is sensible in light of the fact that local PHAs, being most closely associated with the tenants themselves and having the most knowledge about the local situation, are best situated to give individualized consideration to each case. *See* 42 U.S.C. § 1437(a)(1)(C); *see also Gholston*, 818 F.2d at 781 ("The administration of local housing authorities is a difficult task. . . . Consequently, the scope of judicial review of a local housing authority's policies and practices is limited, and we will not view its actions as a violation of the Housing Act or HUD regulations unless it abused its discretion." (citations omitted)).

D

Our conclusion that section 1437d(*l*)(5) authorizes termination of tenancy regardless of the tenant's knowledge of the drug-related criminal activity is reinforced by two related statutory provisions.

1

First, 42 U.S.C. § 1437d(c)(4)(A)(iii), which was in effect through 1996, prohibited any individual or family who was evicted because of a household member's or guest's drug-related criminal activity from receiving a statutory preference in applying for public housing, but exempted from this three-year prohibition period any member of a family of an individual who "the agency determines clearly did not participate in and had no knowledge of" the activity that formed the basis of the

original eviction. 42 U.S.C. § 1437d(c)(4)(A)(iii).[12] If an "innocent tenant" could not have been evicted in the first place, there would have been no need for Congress to write a statute specifically waiving the three-year prohibition period for them. Adhering to the well-established "principle that statutes should not be construed to make surplusage of any provision," *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996), we must interpret section 1437d(*l*)(5) as authorizing the eviction of "innocent tenants." This is especially so in light of the fact that Congress enacted the three-year prohibition period of

[12] The statute reads in relevant part:

> (4) [T]he public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project, including requirements pertaining to—
>
> (A) . . . the establishment of tenant selection criteria which—
>
> (iii) prohibit *any individual or family evicted from housing assisted under the chapter by reason of drug-related criminal activity* from having a preference under any provision of this subparagraph for 3 years unless the evicted tenant successfully completes a rehabilitation program approved by the agency, except that the agency may waive the application of this clause under standards established by the Secretary (which shall include waiver for *any member of a family . . . an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity or when circumstances leading to eviction no longer exist*). *Id.* (1996) (emphases added). Congress significantly revised this statute in 1996 and again in 1998. *See id.* (1999); *id.* (1997).

section 1437d(c)(4)(A)(iii) in 1990, the same year it made amendments to section 1437d(*l*)(5).[13]

2

The second statute that lends credence to our interpretation of the public housing lease statute is a civil forfeiture statute which, *inter alia*, makes leasehold interests subject to forfeiture when used to commit drug-related criminal activities. *See* 21 U.S.C. § 881(a)(7).[14] In sharp contrast to section 1437d(*l*)(5),

[13] With respect, the dissent's reading of section 1437d(c)(4)(A)(iii) does not make sense. The dissent essentially argues that the statutory waiver applies to applicants for public housing regardless of whether such applicants had ever been evicted from such housing. What the dissent overlooks is that only an "individual or family *evicted* from [public] housing by reason of drug-related criminal activity" would ever *need* a waiver, because only such evicted former tenants would be subject to the three-year prohibition period in the first place. 42 U.S.C. § 1437d(c)(4)(A)(iii) (emphasis added). Thus the waiver would be utterly irrelevant to someone who had never lived in nor been evicted from public housing. As a matter of simple logic, one must be a *tenant* of public housing before one can be *evicted* from public housing for drug-related activity. In other words, the scope of the *waiver* of the prohibition period cannot be any broader than the scope of the prohibition itself.

[14] Section 881(a)(7) provides:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of

this civil forfeiture statute includes an explicit exception for "innocent tenants": "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted *without the knowledge or consent of the owner*." *Id.* (emphasis added). This civil forfeiture provision makes abundantly clear that Congress knows how to legislate an "innocent tenants" exception. The absence of similar language in section 1437d(*l*)(5) indicates that Congress did not intend to create such an exception with respect to public housing evictions.[15]

Tenants interpret section 881(a)(7) quite differently. They argue, for the first time in supplemental briefing filed after oral argument, that Congress understood the "innocent tenant" exception of section 881(a)(7) to be a constitutionally mandated requirement such that it must have wanted to incorporate the same exception into the public housing lease statute. We find this reasoning unpersuasive. That there may be a constitutional bar to *forfeiture* of property when the property owner is uninvolved and unaware of the wrongful

any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. *Id.*

[15] The dissent argues that "Congress must have meant [section 1437d(*l*)(5) and amended section 881(a)(7)]—passed as part of the same chapter of the same Act—to be interpreted consistently." Dissenting Op. at 654. But the dissent's recommended course of action—giving these two provisions the *same* meaning, despite their clearly *different* language—is surely no recipe for consistent interpretation. *Cf.* Dissenting Op. at 657 ("The fact that Congress chose to use different language in similar situations tends to show it intended a different meaning.").

activity that formed the cause for forfeiture, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080, 40 L.Ed.2d 452 (1974), does not mean that there is a similar bar in the distinct context of *eviction* proceedings.

The statute governing civil forfeitures differs in many respects from the public housing lease statute. First, forfeiture under section 881(a)(7) involves the transfer of private property to the federal government,[16] which raises concerns of misdirected incentives. *See Bennis v. Michigan*, 516 U.S. 442, 456, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996) (Thomas, J., concurring) (noting that if abused, "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners"); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81-82, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993) (Thomas, J., concurring in part and dissenting in part); Michele M. Jochner, *Illinois Bar Journal*, 87 Ill. B.J. 78, 79 (1999) ("[T]he relative ease with which the government can seize and forfeit property, when measured against the disproportionately punitive nature of some forfeitures, has caused concern that the considerable revenue added by the forfeited assets to the government's coffers may spur overzealous prosecution." (footnote omitted)). The concerns raised by allowing the federal government to fill its coffers through seizures of property for minor offenses, *see United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 2032, 141 L.Ed.2d 314 (1998) (government seized $357,144 in cash that Bajakajian attempted

[16] Forfeiture proceedings involve suits by the federal government against the property. *See, e.g., United States v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 490 (9th Cir. 1990).

to leave the country with without complying with federal reporting requirements); *Calero-Toledo*, 416 U.S. at 668 n.4, 693, 94 S. Ct. 2080 ($20,000 yacht forfeited based upon the discovery of one marijuana cigarette), simply do not arise under section 1437d(*l*)(5), since PHAs do not reap a financial windfall when they evict tenants.

Second, to seize property under the forfeiture provision, the federal government need only show *probable cause* that the property was used for prohibited purposes, with the burden then shifting to the leaseholder to establish, by a preponderance of the evidence, lack of knowledge or consent. *See United States v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 490 (9th Cir. 1990). Probable cause is, of course, a lower standard of proof than the preponderance of evidence test typically required in civil proceedings. *See United States v. All Right, Title & Interest in Real Property & Bldg. Known as 303 West 116th Street, New York, New York*, 901 F.2d 288, 291 (2d Cir. 1990); *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1983). Third, summary seizure procedures are available to the federal government in forfeiture cases. *See* 21 U.S.C. § 881(b). The ability to seize a leaseholder's property using such procedures—without proof that it is more likely than not that the resident engaged in, or permitted, drug-related criminal activity—is an awesome power, which both Congress and the Supreme Court have seen fit to rein in. *See id.* § 881(a)(7) (incorporating "innocent tenant" exception and allowing seizure of property only where the drug offense is punishable by more than one year imprisonment); *Bajakajian*, 118

S. Ct. at 2031 (holding that forfeitures may violate the Eighth Amendment Excessive Fines Clause).[17]

Congress sensibly limited forfeiture to the more reprehensible violations of our drug laws—specifically, drug offenses punishable by more than one year and committed with the knowledge or consent of the leaseholder. *See* 21 U.S.C. § 881(a)(7). Congress did not see the need to limit eviction by PHAs in a similar fashion. Thus, the "innocent tenants" exception contained in section 881(a)(7) applies only to that section, and not to section 1437d(*l*)(5).[18]

E

Tenants rely heavily on another related statutory provision, 42 U.S.C. § 1437d(*l*)(1), which prohibits PHAs from including "unreasonable terms and conditions" in their leases. 42 U.S.C. § 1437d(*l*)(1).[19] Tenants argue that there is no sensible reason for evicting a tenant who does not know of a household member's or

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[17] Although eviction under California law has been denominated a "summary proceeding," Dissenting Op. at 634 n.4, a landlord seeking to evict a tenant still has to prove the existence of a ground for eviction by a preponderance of the evidence. *See Western Land Office, Inc. v. Cervantes*, 175 Cal. App. 3d 724, 220 Cal. Rptr. 784, 797-98 & 797 n. 10 (1985).

[18] At times the dissent appears to argue that the anti-forfeiture provision of section 881(a)(7), in addition to reflecting certain general constitutional concerns, applies *directly* to the termination of tenancies as authorized under section 1437d(*l*)(5). *See* Dissenting Op. at 654-55. If this is in fact the dissent's argument, it is untenable, because the anti-forfeiture provision by its terms governs only forfeitures made "under this paragraph," i.e., forfeitures to the federal government pursuant to section 881(a)(7).

[19] In 1998, this provision was recodified as section 1437d(*l*)(2). As do the parties, we will continue to refer to this subsection as (*l*)(1).

guest's drug-related criminal activity and thus that any lease provision authorizing the eviction of an "innocent tenant" violates section 1437d(*l*)(1)'s reasonableness requirement. We cannot agree.

As an initial matter, Tenants' argument contravenes the canon of statutory interpretation that a general statutory provision typically cannot be used to trump a specific provision. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-26, 109 S. Ct. 1981, 104 L.Ed.2d 557 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-45, 107 S. Ct. 2494, 96 L.Ed.2d 385 (1987). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S. Ct. 2474, 41 L.Ed.2d 290 (1974)).

Moreover, crime in public housing—much of which finds its roots in drugs[20]—is a severe problem. Authorizing the eviction of households with drug-dealing and drug-using members is a reasonable step towards achieving Congress's self-declared "duty to provide public housing that is decent, safe, and free from illegal drugs." *Id.* § 11901. By making a household member's or guest's drug-related criminal activity grounds for the tenant's eviction, Congress created a

[20] That Congress viewed *drug-related* criminal activity as especially pernicious is evidenced by the fact that, with respect to non-drug-related criminal activity, only that which "threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants" is cause for termination of tenancy, whereas this limiting provision does not apply to drug-related criminal activity, which is *per se* cause for eviction. *See* 42 U.S.C. § 1437d(*l*)(5).

strong incentive for public housing tenants to refrain from inviting drug dealers and drug users to their premises and to ensure that household members and guests do not sell, manufacture, distribute, use, or possess controlled substances. *See* 56 Fed. Reg. 51560, 51566-67. Congress was reasonably concerned with preventing tenants from turning a blind eye to the conduct of a household member or guest.

Requiring PHAs to prove that a tenant knew or reasonably should have known of a household member's or guests's drug-related criminal activities in order to evict would hamstring their efforts to rid public housing of the crime and violence with which low-income families must cope on a daily basis. *See id.* Congress could reasonably have decided not to create an "innocent tenant" exception to avoid transforming efficient unlawful detainer actions into fact-based and potentially costly and lengthy legal cases. At present, a PHA can evict a tenant simply by showing that the tenant, a member of his household, or his guest used, sold, distributed, manufactured, or possessed a controlled substance on or near the public housing premises. Such proof is relatively easy to obtain, since a PHA can offer arrest or conviction records to prove the drug-related criminal activity, leaving little room for factual disputes. Significant delays would ensue if PHAs were required to expend time and effort litigating what the tenant actually knew or what he should have known. These are inherently factual issues which will often boil down to credibility determinations, the resolution of which will almost always require an actual trial.[21]

[21] This would be so even if the knowledge factor were incorporated as an affirmative defense with the burden of proof on the tenant to show his "innocence."

PHAs might well agree that, the faster a drug-dealing or drug-using household is evicted, the better. Moreover, it may often be difficult to secure admissible proof of what the tenant knew or should have known. Even if everyone in the apartment building knows who the drug dealers and drug users are, few, if any, may be willing to testify in court—or even to go on the record—against a tenant with gun-toting, drug-dealing household members or friends. Witness intimidation is a very real problem. *See* 18 U.S.C. § 1512.

The decision not to include an "innocent tenant" exception also reasonably helps to keep down litigation costs. It is all too easy to belittle this problem, but we must remember that PHAs already lack adequate funding. OHA, for example, stated before the district court that it does not even have enough funds to maintain a full-time security staff at each of its housing developments. Forcing OHA and other PHAs to utilize more of their already scarce funds in litigation will deprive them of money needed to fund other important activities such as security. To avoid this result is eminently reasonable. *See Phillips Neighborhood Hous. Trust v. Brown*, 564 N.W.2d 573, 575 (Minn. Ct. App. 1997) ("[T]here is a strong public policy interest in eliminating drugs from subsidized housing. Evicting those who violate the lease by having controlled substances in their apartments is [the landlord's] most effective, if not its only effective, means of eliminating drugs and providing a safe environment.").

The reasonableness of making drug use by household members and guests a ground for eviction from public housing is supported by the fact that leases for privately-owned housing often hold tenants liable for the activities of their household members and guests. The "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). Thus, a private tenant can often be evicted if his children or other household members cause significant damage to property, harass neighbors, or engage in illegal activities. The fact that private landlords include these provisions in their leases even though they are not obligated by law to do so shows that it is sensible to make a third party's drug activities cause for termination of tenancy.[22]

We note that "no fault" liability is routinely imposed in related contexts. For example, many states hold parents vicariously liable for the intentional torts of their children regardless of whether the parents knew, or should have known, that their children would cause bodily injury or property damage. *See, e.g.*, Conn. Gen. Stat. § 52-572; Kan. Stat. Ann. § 38-120; Or. Rev. Stat. § 30.765(1). The rationale underlying making "innocent

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[22] A Minnesota statute provides that: "In every lease or license of residential premises, whether in writing or parol, the lessor or licensor and the lessee or licensee covenant that . . . neither will . . . unlawfully allow controlled substances in those premises or in the common area and curtilage of the premises." Minn. Stat. § 504.181, subd. 1. In Minnesota, a tenant is liable for activities that breach the lease even if the tenant did not participate in or control the conduct. *See Phillips Neighborhood Hous. Trust*, 564 N.W.2d at 575.

parents" liable for their children's actions—to encourage parents to oversee the behavior of their children—is essentially the same as that underlying Congress's decision to impose a "no-fault" eviction policy—to encourage tenants to monitor the conduct of their household members and guests. Just as states reasonably impose liability even on "innocent parents," Congress reasonably may authorize the eviction of "innocent tenants." Such "no fault" liability is not limited to parent-child cases. In the environmental context, a property owner can be held liable for the costs of cleaning up waste on his property even if the waste was legally deposited by a previous property owner. *See* 42 U.S.C. § 9607. Thus, even an "innocent property owner" can be subjected to substantial liability under the Superfund laws.

Any conclusion to the contrary is squarely foreclosed by the recent enactment of 42 U.S.C. § 13662(a)(1), which provides:

> Notwithstanding any other provision of law, *a public housing agency* or an owner of federally assisted housing (as applicable), *shall establish* standards or *lease provisions* for continued assistance or occupancy in federally assisted housing that allow the agency . . . *to terminate the tenancy* or assistance for *any household* with a *member*—(1) who the public housing agency or owner determines is *illegally using a controlled substance* . . . .

42 U.S.C. § 13662(a) (emphases added). Congress, in passing this statute expressly allowing the eviction of any household with a drug-using member, declared its view that it is reasonable to evict a tenant on the basis of another's crimes. Unless we are so bold as to say that a policy decision reflected in legislation enacted

with the votes of 409 Representatives and 96 Senators is not rationally related to a legitimate housing purpose, we must conclude that HUD's interpretation of section 1437d(*l*)(5) is indeed reasonable.[23] Keeping in mind that PHAs have discretion in deciding whether to evict in individual cases, we hold that it is not unreasonable for Congress to obligate all public housing tenants to ensure that their household members and guests refrain from engaging in drug-related criminal activities or other activities that threaten the health or safety of other public housing tenants.[24]

F

Although both parties present arguments based upon the legislative history, we conclude that there is no need to examine it in the present case. Where, as here, the language of the statute is plain and unambiguous, resort to legislative history is unnecessary. *See United States v. Gonzales*, 520 U.S. 1, 6, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997); *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) ("[W]here statutory command is straightforward, 'there is no reason to resort to legislative history.'" (citation omitted)), *cert.*

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[23] We realize, as does the dissent, that section 13662 was not in existence when this lawsuit was commenced. Nevertheless, the policy decisions reflected in that provision shed light upon the reasonableness of HUD's interpretation of section 1437d(*l*)(5).

[24] The scattered case law on point generally supports our conclusion. *See Green*, 657 So.2d at 555; *cf. Coleman v. City of Yonkers Mun. Hous. Auth.*, 254 A.D.2d 482, 679 N.Y.S.2d 624, 624-25 (N.Y. App. Div. 1998) (affirming eviction of tenant on the basis of son's actions); *City of South San Francisco Hous. Auth.*, 41 Cal.App. 4th Supp. at 16-20. *But see Richmond Tenants Org. v. Richmond Redevelopment & Hous. Auth.*, 751 F. Supp. 1204, 1206 (E.D. Va. 1990) (concluding that it is unreasonable to evict a tenant for any conduct that occurs off-premises).

denied, 527 U.S. 1022, 119 S. Ct. 2367, 144 L.Ed.2d 771 (U.S. 1999). We have warned that: "Reliance on such history is particularly suspect when it is inconsistent with the ordinary understanding of the words in the statute and an otherwise reasonable agency interpretation." *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1070 (9th Cir. 1998); *see also id.* ("[T]he use of legislative history as a tool for statutory interpretation suffers from a host of infirmities: not only is legislative history 'not passed by both houses of Congress and signed into law by the President,' but it also 'need not be written with the same care, or scrutinized by those skeptical of the statute with the same care, as statutory language.'" (citations omitted)).

In any event, even if we were to resort to it here, the relevant legislative history is ambiguous. Both HUD and Tenants focus on the following statement by the Senate Banking, Housing and Urban Affairs Committee ("Committee"):

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. Tenants contend that the Committee's statement that "eviction would not be the appropriate course" indicates that section 1437d(*l*)(5) does not authorize the eviction of tenants with no knowledge of the drug-related criminal activities. HUD, focusing on a different part of the same passage,

emphasizes that the Committee explicitly entrusted individual eviction decisions to the "wise exercise of humane judgment" of the local PHA, reasoning that, had Congress not intended to give PHAs discretion to evict tenants with no knowledge of the drug-related criminal activity, it would not have talked about the exercise of "humane judgment" by PHAs since there would be no "judgment" to exercise. Whether the legislative history bolsters HUD's position or Tenants' is unclear. There are strong arguments on both sides. To the extent that legislative history is ever helpful, it is not of value in the present case.

V

Having concluded that the plain language of 42 U.S.C. § 1437d(*l*)(5), considered both by itself and in light of the broader statutory context, makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity, we must decide whether this statute is consistent with the United States Constitution. Tenants maintain that the public housing lease provision violates their Fourteenth Amendment right to intimate association as well as the Eighth Amendment prohibition against excessive fines. Before turning to these challenges, we consider whether section 1437d(*l*)(5) violates the First Amendment, since it was under this provision that the district court concluded that the statute, as we have concluded it must be interpreted, would be unconstitutional.

A

According to the district court, the only rational objective served by authorizing the eviction of "innocent tenants" is to discourage household members and guests from using drugs because they know their conduct can lead to the tenant's eviction. In the district court's view, this objective violates the First Amendment guarantee of freedom of association. This conclusion, however, is foreclosed by the Supreme Court's decision in *Lyng v. International Union, UAW*, 485 U.S. 360, 108 S. Ct. 1184, 99 L.Ed.2d 380 (1988).

Lyng involved a freedom of association challenge to a statute providing that no household would become eligible to receive food stamps if any household member were on strike. Although the statute could be seen as an attempt to discourage workers from striking because of the resulting costs that would be imposed upon the entire household, the Supreme Court rejected this argument on the basis that the statute did not "order" individuals not to associate with one another, nor did it "directly and substantially interfere with family living assignments." *Id.* at 364-65, 108 S. Ct. 1184 (quoting *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 91 L.Ed.2d 527 (1986)). Similarly here, section 1437d(*l*)(5) does not order individuals not to associate with one another, nor does it directly and substantially interfere with family living arrangements. Just as it does not violate the Constitution to deny an entire household food stamps on the basis of one member's decision to participate in a strike, it is not unconstitutional to evict an entire household on account of one member's drug use.

Our conclusion comports with that of the Fifth Circuit, which has held that evicting a tenant on the

basis of his son's drug-related criminal activity does not interfere with constitutionally protected associational rights. *See Chavez v. Housing Auth. of El Paso*, 973 F.2d 1245, 1247-48 (5th Cir. 1992). Similar constitutional challenges have been rejected by other courts as well. *See, e.g., City of South San Francisco Hous. Auth.*, 41 Cal. App. 4th Supp. at 19-20 (rejecting a tenant's substantive due process challenge to eviction based on drugs found in his son's room where there was no evidence that the tenant knew or had reason to know of his son's illegal conduct). Tenants, quite simply, are not being evicted because of their association with drug users. Instead, OHA is terminating their tenancy because of their failure to comply with a lease provision by which they agreed to abide.

B

We turn then to the right to intimate association under the Fourteenth Amendment. Tenants contend that any statute that imposes an "undue burden" upon a constitutionally protected privacy right is subject to strict scrutiny, *see Planned Parenthood v. Casey*, 505 U.S. 833, 874, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992), and that section 1437d(*l*)(5) unjustifiably burdens Tenants' right to intimate association under the Fourteenth Amendment.

Although "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships," *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544, 107 S. Ct. 1940, 95 L.Ed.2d 474 (1987), OHA's no-fault eviction policy serves the reasonable objective of deterring drug-related criminal activity. *Casey*, on which Tenants rest their argument, states that "[t]he fact that a law which

serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 873-84, 112 S. Ct. 2791. The purpose of the public housing lease statute is *not* to burden tenants' intimate association rights, but to promote the weighty governmental interest of providing a safe, drug-free environment for low-income families. Because Tenants have not shown that enforcement of the lease "burdens a fundamental right by 'directly and substantially' interfering with family living arrangements," *Chavez*, 973 F.2d at 1248 (quoting *Lyng*, 477 U.S. at 638, 106 S. Ct. 2727), we conclude that section 1437d(*l*)(5) does not impose an undue burden and thus does not violate tenants' freedom of intimate association.

C

Tenants raise an excessive fines challenge to section 1437d(*l*)(5). The Eighth Amendment's Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Bajakajian*, 118 S. Ct. at 2033 (quoting *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993) (emphasis deleted)).

A punishment is not, however, subject to excessive fines analysis if it is "not cash or in kind payment directly imposed by, and payable, to the government." *Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir. 1997). In rejecting an excessive fines challenge to a punitive damages award, the Supreme Court explained that "the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines *directly imposed by, and payable*

to, the government." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989) (emphasis added); *see also id.* at 265, 109 S. Ct. 2909 ("[W]e think it significant that at the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment *to a sovereign* as *punishment* for some offense." (emphases added)). The Supreme Court has made clear that the Excessive Fines Clause applies only when the government, acting with *punitive* intent, extracts a payment *to itself*. *See Bajakajian*, 118 S. Ct. at 2033 ("Forfeitures—payments in kind—are thus 'fines' [subject to Eighth Amendment scrutiny] if they constitute punishment for an offense."); *Austin*, 509 U.S. at 609-10, 113 S. Ct. 2801 ("The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'").

The purported "punishment" in the present case—termination of tenancy—is neither a cash nor an in-kind payment imposed by and payable to the government. Accordingly, it is not subject to analysis as an excessive fine. Seeking to overcome this hurdle, Tenants cite cases involving excessive fines challenges to civil forfeitures. Civil forfeitures *do* involve a payment to the government—in the case of leaseholds, the government assumes the property right in the tenancy (e.g., if the tenant in a private apartment building has paid rent for the year, the federal government acquires the tenant's rights in that apartment for the remainder of the year and can utilize that apartment for the remainder of the year without having to pay additional rent)—and thus may be subject to excessive fines analysis under the Eighth Amendment. *See, e.g.,*

United States v. 3814 NW Thurman, 164 F.3d 1191, 1197 (9th Cir. 1999), *amended by* 172 F.3d 689 (9th Cir. 1999). These civil forfeiture cases are, however, inapposite to the present case because we are not dealing with an attempt by the federal government to seize Tenants' property under the civil forfeiture laws. *See supra* Part IV-D-2.[25]

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[25] The dissent appears to view our rejection of Tenants' excessive fines challenge as based upon a belief that the Excessive Fines Clause does not apply to the states. We need not, and do not, express any view on such issue. As previously discussed, an eviction from public housing based upon breach of a lease provision relating to drug-related criminal activity simply does not implicate civil forfeiture laws, be they state or federal in origin.

Treating an eviction authorized by section 1437d(*l*)(5) as a forfeiture, the dissent expresses its view that HUD's regulations, insofar as they permit eviction of "innocent tenants," may violate the Fourteenth Amendment's Due Process Clause. Even assuming that such an eviction could be treated as a forfeiture, we cannot agree. The dissent relies most heavily upon the concurring opinions of Justice Thomas and Justice Ginsburg in *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996). While these opinions are quite interesting, the opinion of the Court—which both Justice Thomas and Justice Ginsburg joined in full— controls. The *Bennis* Court upheld, as *consistent* with due process, the forfeiture of Bennis's entire interest in a car that she co-owned with her husband—even though she had no knowledge that he would use the car to engage in illegal sexual activity with a prostitute. In rejecting Bennis's "innocent owner" defense, the Court made clear that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Id.* at 446, 116 S. Ct. 994. *Bennis* simply cannot support the dissent's analysis.

VI

Having resolved the APA and constitutional issues, we now turn to Walker's ADA claim. The district court held that, as a result of Walker's disability which renders him incapable of living alone, the burden imposed by 42 U.S.C. § 1437d(*l*)(5) to ensure that guests do not engage in drug-related criminal activity weighs more heavily on him than on others. While a tenant without Walker's disability can choose not to invite guests over, Walker does not have this option because he requires the constant assistance of a care-giver. The district court held that OHA cannot evict him on the basis of his care-giver's drug-related criminal activity.

It is not disputed that OHA must provide reasonable accommodations to disabled tenants. *See, e.g., Green v. Housing Authority*, 994 F. Supp. 1253, 1255-56 (D. Or. 1998). The ADA specifically provides that the failure to provide disabled persons with reasonable modifications constitutes discrimination:

> [Discrimination includes] a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii). A HUD regulation similarly focuses on the need to provide disabled persons with reasonable accommodation:

> For all aspects of the lease and grievance procedures, a handicapped person shall be provided

> reasonable accommodation to the extent necessary to provide the handicapped person with an opportunity to use and occupy the dwelling unit equal to a non-handicapped person.

24 C.F.R. § 966.7(a).

Walker needs a care-giver; he does not, however, need a *drug-using* care-giver. OHA *did* accommodate Walker by not attempting to terminate his tenancy until after the third time that drugs or drug paraphernalia were found in his apartment. On each occasion, OHA issued Walker a lease violation notice, thus giving him ample notice of the fact that his care-giver was using drugs within his apartment. Facing two strikes, Walker chose to retain his care-giver even though she persisted in using drugs in his apartment.[25] OHA is not required by the ADA to provide Walker with accommodation that is not reasonable, *see Memmer v. Marin County Courts*, 169 F.3d 630, 633-34 (9th Cir. 1999); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048-51 (9th Cir. 1999), and we hold that a request to waive applicability of section 1437d(*l*)(5) to a tenant's care-giver is not reasonable (at least where it has not been shown that only a care-giver who uses drugs can provide the tenant with "an opportunity to use and occupy the dwelling unit equal to a non-handicapped person"). 24 C.F.R. § 966.7(a).

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[25] Walker did fire his care-giver after the issuance of the third lease violation, but has not offered any reason why he did not take this step earlier.

VII

With no likelihood of success on the merits of their claims, Tenants are not entitled to a preliminary injunction. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 710-11 (9th Cir. 1997). We accordingly vacate the preliminary injunction and remand to the district court for further proceedings consistent with this opinion.

The order granting the preliminary injunction is REVERSED, and the preliminary injunction is VACATED.

W. FLETCHER, Circuit Judge, dissenting:

This case involves the attempted eviction of four tenants and their families from public housing in Oakland, California. Appellee Pearlie Rucker is a 63 year-old woman who has lived in public housing for 13 years. She currently lives with her mentally disabled daughter, her two grandchildren, and her great-grandchild. Appellants assert as a ground for her eviction that Ms. Rucker's mentally disabled daughter possessed cocaine three blocks from her apartment. Ms. Rucker regularly searches her daughter's room for evidence of drug activity and has warned her and others that drug activity in the apartment could result in their eviction. Appellee Willie Lee is a 71 year-old man who has lived in Oakland public housing for 25 years. He currently lives with his grandson. Appellants assert as a ground for his eviction that Mr. Lee's grandson possessed marijuana in a parking lot of the housing complex. Appellants do not allege that Mr. Lee had any knowledge of his grandson's marijuana possession. Appellee Barbara Hill is a 63 year-old woman who

has lived in the same public housing apartment for 30 years. Like Mr. Lee, she currently lives with her grandson. Appellants assert as a ground for her eviction that her grandson possessed marijuana in the parking lot of the housing complex. Appellants do not allege that Ms. Hill had any knowledge of her grandson's marijuana possession.

Appellee Herman Walker is a disabled 75 year-old man who has lived in "senior" public housing for eight years. He is not capable of living independently and requires an in-home caregiver. Appellants assert as a ground for Mr. Walker's eviction that his caregiver and his caregiver's guests possessed cocaine and drug paraphernalia in his apartment. Appellants do not allege that Mr. Walker himself engaged in drug-related activity.

Appellants contend that 42 U.S.C. § 1437d(*l*)(5), part of the National Housing Act, authorizes eviction of public housing tenants and their families if any member of the household engages in any drug-related criminal activity (including possession of marijuana) on or near the public housing premises, whether or not the tenant had any knowledge of, or ability to control, that activity. Under appellants' construction of the statute, a parent who disapproves of drugs and diligently tries to keep her children off drugs, but who has an adolescent child who experiments with marijuana, is subject to eviction. Needless to say, this law, as construed by appellants, is not the standard under which American families are permitted to remain in private homes. If families were permitted to remain in their private homes only on condition that no family member had ever used or possessed illegal drugs in or near the

home, many American families would be made homeless.

The district court preliminarily enjoined the evictions as not authorized under 42 U.S.C. § 1437d(*l*)(5), and the majority reverses. Because I believe that the majority misconstrues the applicable law, I respectfully dissent.

Discussion

I will first discuss the attempted eviction of appellees Ms. Rucker, Mr. Lee, and Ms. Hill. I will then discuss the attempted eviction of appellee Mr. Walker, whose case presents an additional issue concerning the Americans with Disabilities Act.

I. *Eviction of Appellees Ms. Rucker, Mr. Lee, and Ms. Hill*

The central issue in this case is whether tenants without knowledge of, or ability to control, off-premises drug-related activity of household members may be evicted from public housing. If appellants had sought only to evict the household member engaged in drug-related activity, we would not be here today. However, appellants seek to evict not only the offending member of the household, but also the innocent head-of-household and other innocent family members.

A. *The Lease Provision*

The directly governing statutory provision in this case was originally passed as part of the Anti-Drug Abuse Act of 1988, Public Law 100-690, 102 Stat. 4300, now amended and codified at 42 U.S.C. § 1437d(*l*). In its current form, it provides, in relevant part:

Each public housing agency shall utilize leases which—

(1) do not contain unreasonable terms and conditions; [and]

* * *

(5) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy[.]

1. *Plain Meaning of the Statute*

The district court found that the express language of the lease provision is silent as to the treatment of "innocent tenants." An examination of the text of the statute and the arguments of the parties reveals that the district court was correct.

Appellant HUD argues, and the majority agrees, that Congress meant to provide for the eviction of innocent tenants because the language "*any* drug-related criminal activity on or near such premises . . . shall be cause for termination of tenancy" (emphasis added) means that no one, even an innocent tenant, is excluded. The majority thus equates Congress' silence as to whether a tenant is required to know about, or be able to control, the drug-related criminal activity with Congress' specific intent that the statute be applied to innocent tenants.

The majority reaches its conclusion by construing "any drug-related criminal activity" to mean "all" such activity without limitation. But such an all-encompassing reading leads to absurd results. If "any" truly means "all," without limitation, Congress must also have specifically intended that the drug-related criminal activity could occur at any time and still be cause for termination of the lease, since the statute is silent as to when the drug-related criminal activity must occur. In other words, such a reading leads to the conclusion that Congress specifically intended that if a family member engaged in drug-related activity five years ago, or if the tenant invites a guest into her apartment and the guest engaged in such activity five years ago, the drug-related criminal activity of the family member or guest would be cause for termination, regardless of whether the tenant had any knowledge of that activity.

Congress could not have intended such an absurd result. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & SF Ry. Co.*, 520 U.S. 510, 516, 117 S. Ct. 1513, 137 L.Ed.2d 763 (1997). Contrary to the reading adopted by the majority, the only reasonable interpretation of the statute is that Congress did not mean "any" in the most all-encompassing sense possible. *See Lewis v. United States*, 523 U.S. 155, 158-160, 118 S. Ct. 1135, 1139, 140 L.Ed.2d 271 (1998) (an all-encompassing reading of the words "any enactment" "is not a sensible interpretation of this language [since such a reading] would dramatically separate the statute from its intended purpose."). HUD itself has rejected an all-encompassing interpretation of the word "any." In adopting its regulation implementing § 1437d(*l*)(5), HUD limited the words "any drug-related criminal

activity" to mean any such activity taking place at the time a wrong-doer is a guest, 56 Fed. Reg. 51562 (1991), even though HUD does not contend this limitation to "any" is in the statute. While HUD's reading of when "any" activity must take place is the only reasonable construction of the statute, it is contrary to the "plain meaning" of that same statute as found by the majority.

Moreover, no matter how broadly "any" is read, the statute is ambiguous as to whose tenancy may be terminated. Section 1437d(*l*)(5) allows for "termination of tenancy" but does not explain whether such termination applies to the tenancies of all members of the household or only to the tenancy of the tenant engaged in the drug-related criminal activity. As I read the statute, Congress contemplated that a termination under this section might be applied only to a tenant engaged in drug-related activity, or to a tenant in a position to know about and control such activity. In support of this reading, I note, for example, that § 1437d(n) specifically provides for notification of the local post office when "a public housing agency evicts *an individual* or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity[.]" (emphasis added). Congress thus foresaw cases where only an individual, rather than an entire family, would be evicted, and the district court did not err in finding that the plain language of the statute did not necessarily require the eviction of innocent tenants.

The district court concluded that any lease term must be reasonable under 42 U.S.C. § 1437d(*l*)(1). There is nothing remarkable about the court's conclusion since the actual language of 42 U.S.C. § 1437d(*l*)(1) provides:

> Each public housing agency shall utilize leases which—
>
> (1) do not contain unreasonable terms and conditions;
>
> * * *

Since all the subparagraphs specifying lease requirements under § 1437d(*l*) are joined with the connector "and" rather than "or," any construction of subparagraph (5) of § 1437d(*l*) must also be "reasonable" under subparagraph (1) of that same section. The majority contends that if there is some conflict between their construction of subparagraph (5) and the reasonableness requirement of (1), subparagraph (5), the more specific, controls over subparagraph (1), the more general. I believe that this is a method for reading the reasonableness requirement out of the statute rather than for reading the two provisions consistently. Where a construction can eliminate potential conflict between the two sections, that construction must prevail. *Hellon & Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

The majority contends that appellants' construction is reasonable because giving protection to innocent tenants would "hamstring" efforts to fight drugs in public housing. In so concluding, the majority relies on facts that are not in the record. The district court found, on the record before it, that the evidence showed that eviction of persons who did not know, could not foresee, and could not control the conduct of others does nothing to further the battle against drugs in public housing. By contrast, where the district court did find that a tenant could do something to assure drug activity would not occur, the court did not extend injunctive

relief to protect such a tenant (even if she was not personally involved in the drug-related activity).[1]

The majority further contends that evicting innocent tenants is reasonable because barring innocence as a defense holds down litigation costs. There are many ways to hold down litigation costs, not all of them reasonable or appropriate. I am confident that the majority does not believe that a public housing authority should be allowed to skip the eviction process altogether and just change the locks. Nor should it believe that it is reasonable to punish the innocent along with the guilty because it is cheaper to litigate under that standard than under a standard that protects the innocent.

Finally, the majority compares eviction from public housing to eviction from private rental property. I find this comparison unhelpful. Suffice it to say that good cause is *always* required for eviction from public housing, 42 U.S.C. § 1437d(*l*)(4), whereas, absent such a provision in the lease, a similar requirement of good cause is generally not required in private residential leases. *See, e.g., S.P. Growers Ass'n v. Rodriguez*, 17 Cal.3d 719, 730, 131 Cal. Rptr. 761, 552 P.2d 721 (1976).

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[1] For example, the court refused to extend protection of innocent tenants to situations where drug activity occurred in the apartment. "A tenant may control what occurs in her unit by ensuring that no one is present when she is not and searching her apartment and perhaps, her guests and household before they enter. In other words, terminating the lease of a tenant for her failure to maintain a drug-free environment in her apartment holds the tenant responsible for something over which she has some control. Eviction under such circumstances appears rationally related to a legitimate public housing goal." Only where a tenant has no ability at all to prevent the drug-related criminal activity did the district court find that the tenant's eviction is unreasonable.

2. *Legislative History*

Since the plain language of the lease provision does not compel either party's interpretation, this court may properly look at legislative history to determine Congress' intent. I believe that the legislative history supports the tenants' interpretation.

The original version of 42 U.S.C. § 1437d(*l*)(5) was enacted as part of the Anti-Drug Abuse Act of 1988. No House or Senate Reports accompanied this legislation, and none of the committee reports had anything to do with the provisions affecting HUD. However, in 1990, Congress revisited termination of tenancy for drug-related activity and effectively rewrote subparagraph (*l*)(5) into its present form. Public Law 101-625. The legislative history indicates that Congress did not intend for innocent family members to be evicted. The Senate Report[2] specifically stated that eviction would not be appropriate "if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." 1990 USCCAN 5941. Likewise, the Conference Report said of an identical passage in the Section 8 housing assistance program: "[T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exist." *Id.* at 5889.

It is well established in this circuit that "the official committee reports provide the authoritative expression of legislative intent" when examining legislative

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[2] The Senate version of this amendment was adopted in the final statute. 1990 USCCAN 6123.

history.[3] *See In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988). The majority opinion attempts to explain these comments as evidence that Congress granted HUD and the public housing authorities (PHAs) discretion not to evict in these situations. However, Congress did not appeal only to the PHAs; it appealed to the "wise exercise of the humane judgment by the PHA *and the eviction court*." 1990 USCCAN 5941 (emphasis added). If Congress had meant to leave the discretion solely with the PHAs, the judgment of the courts would never come into play. Further, the Committee Reports were very clear that these evictions "would not" be appropriate, not that they might not. *Id.* Congress thus left no room for the unchallengeable discretion the majority would grant the government.

B. *The Anti-Forfeiture Provision*

In the Anti-Drug Abuse Act of 1988, Congress both passed the original version of the lease provision (just discussed), which amended the National Housing Act, and amended a pre-existing anti-forfeiture provision of the Controlled Substances Act. Both the lease provision and the amendment to the anti-forfeiture provision were part of Chapter 1 of Subtitle C of Public Law 100-690 (Preventing Drug Abuse in Public Housing). The anti-forfeiture provision was amended by inserting the phrase "(including any leasehold

[3] In an attempt to show a contrary intent, HUD has only quoted isolated statements from witnesses and legislators rather than committee reports. Such statements "cannot be attributed to the full body that voted on the bill." *See In re Kelly* at 912 n.3. Further, even taken at face value, these statements only go to the problem of drugs, a problem all parties as well as the district court acknowledge as serious, not to the question of whether innocent tenants should be evicted.

interest)" into the text of the pre-existing statute. As a result of the amendment, the Controlled Substances Act now provides, in relevant part:

> (a) Subject property
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (7) All real property, including any right, title, and interest (*including any leasehold interest*) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a) (emphasis added: italics indicate material added in 1988; underlined text was already in the statute).

We are faced with a more specific task than merely understanding the lease provision of the National Housing Act and the anti-forfeiture provision of the Controlled Substances Act. We must understand, and make consistent, section 5101 (the lease provision) and section 5105 (the amendment to the anti-forfeiture provision) of Public Law 100-690, which amended these two Acts. It is axiomatic that Congress must have

meant these provisions—passed as part of the same chapter of the same Act—to be interpreted consistently. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570, 115 S. Ct. 1061, 131 L.Ed.2d 1 (1995). The majority argues that the amendment of the anti-forfeiture provision simultaneously with the enactment of the lease provision supports its position. It concludes that Congress (implicitly) intended to deprive innocent tenants of protection under section 5101 of PL 100-690 at the same time it (expressly) intended to protect tenants who had no "knowledge" of, and had not given any "consent" to, drug-related activity under section 5105 of that same law.

In order to conclude that Congress intended the forfeiture of the leasehold interest of an innocent tenant, the majority distinguishes between forfeiture to the federal government and forfeiture to a local government agency. The majority is correct in pointing out that the anti-forfeiture provision deals with forfeitures to the federal government and that the lease provision deals with forfeitures to local housing authorities. The majority recognizes that there "may be a constitutional bar to forfeiture of property when the property owner is uninvolved and unaware of the wrongful activity," *ante* at 642, and it argues that the explicit incorporation of that bar into the anti-forfeiture provision alleviates that constitutional concern when forfeitures to the United States are at issue. But the majority assumes that Congress' awareness of, and intent to alleviate, that same concern somehow disappeared when forfeitures to a public housing authority were at issue. I disagree. To the extent that a reading of a forfeiture statute is driven by a concern to avoid an unconstitutional construction, that concern should be

equally present whether the forfeiture is to the federal government or to a local governmental authority.

The majority distinguishes between forfeitures to the federal government and forfeitures to local authorities based on a hypothesized congressional conclusion that tenants need more protection from the federal government because of the federal government's temptation to enrich itself through forfeiture proceedings. This hypothesis is unsupported by the text, context, or history of the legislation, and I view it as an inappropriate attribution to Congress of a base view of the motivations of federal authorities in forfeiture cases.

The majority further argues that a forfeiture proceeding—whether conducted by the federal government or by a local housing authority—is sufficiently different from an eviction proceeding that the anti-forfeiture provision should in any event not apply to evictions. The most obvious problem with the majority's argument is that leasehold interests are typically terminated by eviction, and that the 1988 Act specifically added "leasehold interests" to the anti-forfeiture provision. *See, e.g., United States v. The Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991) (applying the anti-forfeiture provision, 21 U.S.C. § 881(a), to forfeiture of a leasehold).

The majority argues, finally, that a forfeiture under the statute is available on a lower standard of proof than an ordinary eviction, and that an eviction is therefore not included in the anti-forfeiture provision. But what is at issue in this case is not the burden of proof but the substantive liability of a person who did not and could not know of the criminal activity of another. For purposes of determining whether the statute allows eviction of a person concededly without knowledge, the

burden of proof for demonstrating knowledge is not relevant.[4]

I am unwilling to assume that the constitutional concerns that appear to have motivated Congress when considering forfeiture to the federal government were irrelevant to Congress when considering forfeiture to local governments. Congress made its intent explicit as to the federal government by adding four words to a pre-existing drug-related forfeiture statute applicable to the federal government. There was (and is) no comparable federal drug-related forfeiture statute applicable to local governments that Congress could have amended with comparable ease; indeed, there may even be some question about the scope of Congress' constitutional power to enact such a general statute. It is therefore not surprising that Congress did not put into the Drug Control Act of 1988 an explicit anti-forfeiture provision applicable to local governments. But the absence of such a provision in the Act does not mean that Congress had no concern about the constitutionality of forfeitures of the leaseholds of innocent tenants to local governments. And it certainly does not mean that Congress intended that the lease provision enacted as part of the same Act should be construed to allow forfeitures to local governments that it explicitly forbade to the federal government.

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[4] A related misapprehension in the majority opinion is that innocent tenants need more protection in a forfeiture action but less in an eviction action because forfeiture is a summary proceeding. First, as noted above, the nature of the proceeding has nothing to do with the substantive defenses available. Second, under California law eviction is *itself* a summary proceeding. *Nork v. Pacific Coast Medical Enterprises*, 73 Cal. App. 3d 410, 413, 140 Cal. Rptr. 734 (1977).

C. *Language in Related Statutory Provisions*

1. *Waiver of Disqualification Period for Preferences*

The majority points to an earlier version of 42 U.S.C. § 1437d(c)(4)(A)(iii) in support of its reading of § 1437d(*l*).[5] The version of the statute that existed until 1996—and upon which the majority relies—provided for a three-year disqualification period for "preferences" that would otherwise be available to those applying for tenancy in public housing. Preferences were given, for example, to the homeless, to those paying more than 50% of their income in rent, and to those who had recently been displaced from housing. *See, e.g.*, § 1437d(c)(4)(A)(i). The three-year disqualification for such preferences period applied to "any individual or family" evicted from public housing "by reason of drug-related activity."[6] However, the statute specifically required that there be a waiver of the disqualification period for "any member of a family of an individual prohibited from tenancy under this clause who the agency clearly determines did not participate in and had no knowledge of such criminal activity[.]"

The majority contends that the statutory waiver for an innocent family member must mean that such a family member could have been evicted in the first

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[5] The statutory language relied upon by the majority was superceded in 1996. The majority's argument is not available under the language of the current statute.

[6] The statutory reference to an "individual or family" evicted for drug-related activity does not imply that innocent family members could be evicted. An entire family could be evicted if all the members of the family either themselves engaged in drug-related activity, or knew about and failed to control drug-related activity.

place, for otherwise that innocent family member would not be re-applying for public housing. According to the majority, "If an 'innocent tenant' could not have been evicted in the first place, there would have been no need for Congress to write a statute specifically waiving the three-year waiting period for them." The majority has read into the statute a limiting concept that was not there. The statute nowhere used the word "re-apply" or its equivalent. Rather, the statute gave its preferences to all those applying—not merely those re-applying—for public housing; and it similarly imposed its three-year disqualification for preferences on all those applying—not merely those reapplying—for public housing.

Once one understands that the statute covered anyone applying for public housing, the statute made perfect sense. The waiver provision of the statute ensured that applicants for public housing who were entitled to preference did not lose that preference because of the sins of a family member. So long as the applicants had not participated in and had had no knowledge of the drug-related activities of their family member, they were not subject to the three-year disqualification period. Far from supporting the majority's argument, the statute showed Congress' concern that innocent applicants for public housing not suffer because of their family member's drug-related activities.

2. *The Veterans Affairs Act of 1999*

The majority also relies on § 577 of the Veterans Affairs Act of 1999 (codified at 42 U.S.C. § 13662) for its view that Congress plainly meant to evict innocent tenants. The Act was not in effect at the time the case was argued to us, was never presented to the district

court, and has major textual interpretation issues of its own. I do not believe that we should be analyzing this statute at this stage of the litigation, in part because of the obvious hazards inherent in attempting to resolve complex questions of statutory interpretation under a statute that has not been the focus of the parties or the district court, and in part because appellants have not sought to use this statute to evict the tenants in this case. Under the circumstances, I will simply point out that the language of § 577 of the Veterans Affairs Act is different from that of the lease provision of the National Housing Act, and that there is no indication that Congress intended these two provisions to have the same interpretation. The fact that Congress chose to use different language in similar situations tends to show it intended a different meaning. *See Florida Telecommunications Ass'n v. FCC*, 54 F.3d 857, 860 (D.C. Cir. 1995). I do not read § 577 as supporting the wholesale eviction of innocent tenants, for it addresses households with a member who is a drug user, rather than households with a member engaged in unspecified and off-premises drug-related activity, and it addresses rehabilitation of the offending member. Further, and in any event, "the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998).

D. *Avoiding Substantial Constitutional Questions*

A statute that can be construed to avoid substantial constitutional questions should be so construed. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). The construction adopted by the majority raises substantial consti-

tutional questions both under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Since the statute is clearly capable of a construction that will avoid these questions, I believe we should adopt that construction.

1. *Excessive Fines*

The Excessive Fines Clause provides: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishment inflicted." U.S. Const., amend. 8 (emphasis added). Relying on *Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir. 1997), the majority contends that the forfeiture of a leasehold interest is not subject to the clause because it only applies to "'cash or in kind payment directly imposed by, and payable to, the government.'" *Ante* at 648. However, *Kim* holds only that an administrative disqualification is not subject to the Excessive Fines Clause. It does not hold that a forfeiture of a property interest is not subject to the clause. Indeed, *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993), on which *Kim* relies, 121 F.3d at 1276, is directly to the contrary, holding squarely that forfeiture of property is covered by the Excessive Fines Clause, 509 U.S. at 622, 113 S. Ct. 2801.[7]

The majority further contends that the Excessive Fines Clause is inapplicable "because we are not

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[7] *Austin* also suggests that a determination of whether a forfeiture violates the Excessive Fines Clause depends on the facts of the case. *Austin* at 622, 113 S. Ct. 2801. Even if this court did need to reach the issue of whether HUD's application of its regulation to appellees violated the Excessive Fines Clause, the proper procedure would be to remand to the district court for such a determination. *See id.* at 622-23, 113 S. Ct. 2801.

dealing with an attempt by the federal government to seize Tenants' property under the civil forfeiture laws." *Ante* at 649, referring to its earlier discussion of the anti-forfeiture provision, 21 U.S.C. § 881(a). It is, of course, true that the forfeiture in this case is sought by a local government rather than the federal government, but it is a forfeiture nonetheless. Although the question is not entirely settled, it is very likely that the Excessive Fines Clause applies to the states. As Justice O'Connor wrote in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282, 284, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring), "[T]he Cruel and Unusual Punishments Clause [of the Eighth Amendment] has been regularly applied to the States. . . . In addition, the Court has assumed that the Excessive Bail Clause of the Eighth Amendment applies to the States. . . . I see no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States." The majority does not argue that Justice O'Connor is wrong about the incorporation of the Excessive Fines Clause through the Fourteenth Amendment. Indeed, it does not discuss the incorporation issue and Justice O'Connor's opinion at all. But if the majority were to engage in such a discussion, it would have to concede, at the very least, that the incorporation of the Excessive Fines Clause and the application of the Clause to the forfeiture of appellees' leasehold to a local government pose substantial constitutional questions.

2. *Due Process*

The forfeiture of a tenant's leasehold interest under the circumstances presented in this case also raises substantial questions under the Due Process Clause. It is undisputed that tenants of public housing have a property interest in their tenancy. *See Geneva Towers Tenants Org. v. Federated Mortgage Inv.*, 504 F.2d 483, 488-89 (9th Cir. 1974). The holding of the Supreme Court in *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L.Ed.2d 68 (1996), and the discussion in the concurring opinions of Justices Thomas and Ginsburg in that case, strongly suggest that forfeiture of property violates due process if the property has not been used in the commission of the illegal activity in question, and if the owner of the property did not know about, could not foresee, and could not control that activity.

In *Bennis*, a man was arrested for sexual activity with a prostitute in a car co-owned with his wife, and the car was forfeited as a public nuisance. His wife brought suit for the value of her ownership interest in the forfeited car. In a 5-4 decision, the Court held that an innocent owner is subject to forfeiture of her property "by reason of the use to which the property was put even though the owner did not know that it was to be put to such use." *Id.* at 446, 116 S. Ct. 994. Justice Thomas, the fifth vote for the majority, wrote a separate concurring opinion in which he expressed a belief that the result in *Bennis* was ordained by centuries of forfeiture law.[8] However, Justice Thomas also

[8] *See also Austin* at 615, 113 S. Ct. 2801 for an examination of the principles underlying forfeiture. The theories supporting the forfeiture of an innocent person's property are limited to situations where the property to be forfeited was itself misused or where "the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence." *Id.*

expressed a grave concern that forfeiture not be extended beyond cases where the property itself is used for a crime. *Id.* at 456, 116 S. Ct. 994 (Thomas, J., concurring); *see also id.* at 458, 116 S. Ct. 994 (Ginsburg, J., concurring) (the government "has not embarked on an experiment to punish innocent third parties. . . . Nor do we condone any such experiment.")

In the present case, the majority allows forfeiture of the leasehold of innocent tenants for drug-related activity that did not involve the use of the leasehold property and of which the tenants were unaware. This forfeiture thus deprives innocent people of property that was not involved in any crime and punishes innocent people for crimes that they did not commit and could not prevent.[9] I believe that under *Bennis* this is likely a violation of the Due Process Clause.

II. *Eviction of Mr. Walker*

Mr. Walker's case contains an element not present in the cases of Ms. Rucker, Mr. Lee, and Ms. Hill. He contends that the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, protects him from eviction despite the use of drugs in his apartment by his caretaker and his caretaker's guests. As the majority opinion correctly observes, Mr. Walker unquestionably has a right under the ADA to a live-in caretaker, but he does not have a right under the ADA to have a live-in

[9] The district court refused to extend the injunctive relief to situations where the property to be forfeited, the leasehold interest, is directly involved in the drug-related criminal activity. That is, if drugs are found in the apartment, the leasehold is forfeited, regardless of the actual knowledge of the tenants.

caretaker who violates the drug laws. If deciding the case *de novo* on the current record, I might conclude that Mr. Walker had both knowledge of his caretaker's activities and the ability to replace the caretaker. However, this court is not at liberty independently to reweigh the evidence presented to the district court. The district court's findings of fact must be reviewed under the clearly erroneous standard. *Roe* v. *Anderson*, 134 F.3d at 1400, 1402 n. 1 (9th Cir. 1998). Although Mr. Walker clearly had knowledge of his live-in caretaker's drug-related activity after she was initially found to be keeping drugs and drug paraphernalia on the premises, the district court could reasonably have believed that Mr. Walker was, because of his disability, powerless to stop her or find a replacement any sooner than he did.

Mr. Walker claims that his disability prevented him from complying with the anti-drug policy without a reasonable accommodation. The evidence about the extent of Mr. Walker's disability and the degree to which it prevented him from complying with the anti-drug policy is disputed, with both sides presenting conflicting declarations. The majority ignores this dispute and simply adopts appellants' version of the facts as it own. Appellants may be able to establish their version of the facts at trial, but on the record now before us the district court did not abuse its discretion in finding that Mr. Walker's claim was sustainable.

Accepting for present purposes that Mr. Walker may have been prevented from complying with the anti-drug policy by his disability, the question then becomes whether a reasonable accommodation can be made that will bring Mr. Walker into compliance with his lease agreement. Appellants maintain that a blanket waiver

of the anti-drug policy is not a reasonable accommodation. I agree. The district court's order, however, does not require such a waiver. Rather, the district court specifically rejected appellants' claim that a blanket waiver was the only possible accommodation, and held that, based on the complaint, Mr. Walker may be able to show that another accommodation is reasonable. While the district court may ultimately decide in favor of appellants once the record is developed further, the district court did not abuse its discretion by finding that, on the record before it, Mr. Walker had a fair chance of sustaining his claim under the ADA.

Conclusion

For the foregoing reasons, I respectfully dissent from the majority's construction of this statute.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-00781 CRB

PEARLIE RUCKER, ET AL., PLAINTIFFS

v.

HAROLD DAVIS, ET AL., DEFENDANT

June 19, 1998

MEMORANDUM, ORDER AND PRELIMINARY INJUNCTION

BREYER, J.

This action arises from defendant Oakland Housing Authority's termination of plaintiffs' public housing leases on the ground that a member of each plaintiff's household engaged in drug-related criminal activity, even though such activity allegedly occurred without the knowledge of each plaintiff. Defendants Oakland Housing Authority ("OHA"), Department of Housing and Urban Development ("HUD"), and Harold Green, the Director of OHA, have moved to dismiss the first amended complaint and plaintiffs have moved for a preliminary injunction. After carefully considering the papers submitted by the parties, and having heard oral argument on June 2, 1998, the Court concludes that the motions to dismiss should be DENIED in part and

GRANTED in part, and that a preliminary injunction should issue.

BACKGROUND

A. *The Statute, Regulations and Lease.*

> Congress has directed that every public housing agency utilize leases which provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity *on or off such premises*, engaged in by a public housing tenant, *any member of the tenant's household*, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(1)(5) (emphasis added).

In reliance on this statute, HUD has issued a regulation requiring public housing leases to contain the following provision:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or quiet enjoyment of the PHA's [public housing authority's] public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near the premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. 966.4(f)(12)(i). In accordance with this regulation, OHA includes in its leases the obligation that a tenant must

> assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in
>
> (i.) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents or threatens the health and safety of the housing authority employees. . . , or (ii) Any drug-related criminal activity on or near the premises (e.g., manufacture, sale distribution, use, or possession of illegal drugs or drug paraphernalia, etc.).

OHA Lease ¶ 9(m).

HUD interprets the statute, 42 U.S.C. § 1437d(1)(5), and its regulation as permitting termination of the lease even when the tenant "did not know, could not foresee, or could not control behavior by other occupants of the unit." *Public Housing Lease and Grievance Procedures*, 56 Fed. Reg. 51560, 51567 (1991). In their papers, and at oral argument, the plaintiffs referred to the termination of leases under such circumstances as holding the tenant "strictly liable" for the conduct of her household members. *See also Charlotte Housing Authority* v. *Patterson*, 120 N.C. App. 552, 554, 64 S.E.2d 68, 70 (1995) (describing the tenant as being held "strictly liable" for acts committed by her son outside her presence). As defendants note, however, such a term is a misnomer because the tenant is not being held liable, rather, the tenant forfeits her interest in the leasehold. The term is also imprecise because under the law a person is strictly liable for something the person

did. For example, if a person runs a red light she is held "strictly liable" for her conduct even if she did not intend to run the red light. Here, however, the tenant is not alleged to have done anything herself.

The Court will refer to the termination of tenancies under such circumstances as the termination of the lease of an "innocent" tenant as it is conceded that the tenant is innocent of the drug-related criminal activity which is the cause of the lease termination and it is alleged that the tenant is also innocent of any knowledge of the drug-related criminal activity.

B. *The Allegations of the Complaint.*

1. The Plaintiffs.

Plaintiff Pearlie Rucker is 63 years old and has lived in public housing for 13 years. She shares her apartment unit with her daughter Gelinda, who is mentally disabled, two grandchildren and one great-granddaughter. (First Amended Complaint ("FAC") ¶ 5.) OHA served Rucker with a 3-day notice of termination of her tenancy. Rucker did not vacate her apartment as OHA ordered. OHA subsequently filed (and then dismissed) an unlawful detainer action against her in Alameda County Municipal Court, No. 012528. The unlawful detainer complaint alleged that Rucker had violated paragraph 9(m) of her lease, and in particular, that her daughter Gelinda had possessed cocaine three blocks from Rucker's apartment and that her adult son had possessed cocaine eight blocks away. (*Id.* ¶¶ 7-8.) Rucker's son does not reside with her. (*Id.* ¶ 6.) Rucker had no knowledge of Gelinda's drug activity; regularly searches her room for evidence of alcohol and drug activity; and has warned her mentally disabled daughter

and others that any drug activity on the premises can result in eviction. (*Id.* ¶¶ 9-10.)

Plaintiff Herman Walker is 75 years old and disabled. He is no longer capable of living independently and requires an in-home caregiver. He has lived in "senior" public housing for eight years. (FAC ¶¶ 11-12.) OHA served Walker with a three-day notice of termination of his tenancy and when he did not vacate his apartment unit OHA filed an unlawful detainer action against him in Alameda County Municipal Court, No. 011040. The unlawful detainer complaint alleges, among other things, that Walker violated paragraph 9(m) when his caregiver, and caregiver's guests, possessed cocaine in Walker's apartment. It does not allege that Walker engaged in the drug activity or was aware of such activity. (*Id.* ¶ 12-14.)

Plaintiff Willie Lee is 71 years old and has resided in OHA housing for 25 years. (FAC ¶ 16.) Plaintiff Barbara Hill is 63 years old and has lived at her apartment for 30 years. (*Id.* ¶ 21.) OHA served both Lee and Hill with three day notices to vacate. When they did not vacate their apartments, OHA filed unlawful detainer actions against them on the ground that they had violated paragraph 9(m) of their lease. In particular, the actions allege that Lee's and Hill's grandsons, who reside with them, possessed marijuana in a parking lot of the housing complex. (*Id.* ¶¶ 17-18, 22-23.) There is no allegation that Lee or Hill had any prior knowledge of their grandsons' drug-related activity or that they engaged in any drug-related activities themselves. (*Id.* ¶¶ 19, 21.) Both Lee and Hill had warned their household members that any drug use or

criminal activity on the premises can result in eviction. (*Id.* ¶ 20, 24).

2. Plaintiffs' Claims.

Plaintiffs allege that HUD's regulation, and more precisely, its interpretation of the regulation as permitting termination of the leases of "innocent" tenants, is unlawful under the Administrative Procedures Act ("APA"). In particular, plaintiffs contend that the regulation violates the APA because it is not permitted by, and in fact contradicts, the authorizing statute, 42 U.S.C. § 1437d, or, in the alternative, because it violates Congress's mandate that public housing leases not contain unreasonable terms. *See* 42 U.S.C. § 1437d(a). They also argue that terminating the leases of "innocent" tenants violates due process and the first amendment right to freedom of association, and that the attempted evictions of plaintiffs Rucker and Walker violate the Americans with Disabilities Act ("Act"). Plaintiffs also contend that the lease provision at issue here is unenforceable under state contract law.

DISCUSSION

I. DEFENDANTS' MOTIONS TO DISMISS.

A. *Standing.*

Defendants contend that the action must be dismissed because plaintiffs do not have standing to challenge their eviction notices and HUD's regulation. To have standing a plaintiff must establish three elements:

> First, the plaintiff must point to a concrete injury which the plaintiff personally has suffered or with

> which it is imminently threatened (an "injury in fact"). . . . Second, the plaintiff must show that the alleged injury is "fairly traceable" to the defendant's action. . . . Third, the plaintiff must demonstrate that a favorable decision is likely to redress that injury.

Yesler Terrace Community v. Cisneros, 37 F.3d 442, 445 (9th Cir. 1994). In addition, when a plaintiff challenges an agency action under the APA she must show that "the interests she seeks to protect "are arguably within the zone of interests to be protected by the statute in question." *Id.* Defendants argue that none of the plaintiffs has suffered an injury, or is imminently threatened with an injury, because none has forcefully been evicted yet. They contend that unless and until the unlawful detainer actions are resolved against plaintiffs, plaintiffs will not have been injured and thus have standing to contest HUD's regulation and OHA's lease.

Defendants ignore that OHA has served each plaintiff with a three-day notice to quit. The notice itself terminated each plaintiff's tenancy and ordered each plaintiff to vacate the premises. *See* Cal. Code Civ. Pro. § 1161.3 (a tenant is guilty of unlawful detainer upon service of a three-day notice). Plaintiffs were thus injured at the time OHA served each with the notice. It was only because plaintiffs did not vacate as ordered to do so that OHA filed the unlawful detainer actions. If plaintiffs had vacated, thus eliminating the need for an unlawful detainer action, they would still have standing to sue since they would have suffered an injury—the loss of their apartments. In *Tyson v. New York City Housing Authority*, 369 F. Supp. 513

(S.D.N.Y. 1974), for example, the court considered plaintiffs' challenge to a housing authority's finding that plaintiffs were ineligible to continue residing in public housing even though court proceedings had not been initiated to evict plaintiffs from their apartment. *See id.* at 517; *see also Chavez v. Housing Authority of the City of El Paso*, 973 F.2d 1245, 1247 (5th Cir. 1992) (federal court complaint filed before housing authority filed unlawful detainer in county court). The service of the three-day notice, and thus OHA's determination that plaintiffs' tenancies are over, created a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L.Ed. 826 (1941).

OHA's dismissal of the unlawful detainer action does not eliminate Rucker's standing. *See United States v. W.T Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 97 L.Ed. 1303 (1953); *Yesler Terrace Community*, 37 F.3d at 446. Rucker has shown that she has a reasonable expectation that she will again be subject to the challenged policy. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L.Ed.2d 675 (1983). OHA has not rescinded the eviction notice. Moreover, OHA dismissed the unlawful detainer against Rucker *without prejudice*. Finally, paragraph 9(m) is still included in Rucker's lease.

Walker also has standing even though one of grounds on which OHA terminated his lease is not related to paragraph 9(m). OHA is still seeking to have him forcefully removed from his apartment on the ground that he violated paragraph 9(m). Walker, like the others, has been injured.

b. *Younger Abstention.*

Defendants also contend that the Court should dismiss this action based on the *Younger* abstention doctrine. Under that doctrine, federal courts must abstain where state court proceedings (1) are pending when the federal action is filed; (2) implicate important state interests; and (3) provide adequate opportunity to raise the federal claims. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1983); *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994). Such abstention is inappropriate here because the second and third criteria are not present. Defendants have not identified what important state interests are implicated by an unlawful detainer action which involves federally subsidized housing and the interpretation and constitutionality of a lease provision mandated by federal regulations. Moreover, the state unlawful detainer actions will not provide plaintiffs with an adequate opportunity to raise their federal APA claims as HUD is not a party to those actions and the federal courts have exclusive jurisdiction of such claims. *See Aminoil U.S.A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982). Accordingly, the Court has jurisdiction to adjudicate this action.

C. *The APA Claim.*

Under the APA a court must invalidate an administrative regulation which conflicts with an authorizing statute. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987) ("[t]he judiciary is the final authority on issues of statutory construction and must reject administrative construc-

tions which are contrary to clear congressional intent") (citation omitted). If Congress has addressed the precise question at issue in an APA action challenging an agency interpretation of a statute, a court is bound by the intent of Congress. If, however, Congress has not addressed the precise question, and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether" the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

Defendants assert that plaintiffs' APA claim fails as a matter of law because Congress expressly authorized the termination of leases of "innocent" tenants. The authorizing statute provides that "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" shall be cause for termination of the lease. 42 U.S.C. § 1437d(1)(5). Defendants infer from Congress's silence as to the tenant's required knowledge of the drug-related criminal conduct or the tenant's ability to control the drug activity that Congress specifically intended that a tenant could be evicted for the drug conduct of another even if she is not aware, and has no reason to be aware, of such conduct or if the tenant does not have the ability to control the wrong-doer's conduct.

The Court concludes that Congress has not addressed the question of whether a housing authority may terminate the lease of an "innocent" tenant. The statute is silent as to whether a tenant must have

knowledge of, or the ability to control, the drug-related criminal activity of a household member, guest or other person in order for that other person's conduct to be cause for terminating the tenant's lease. Defendants insist that by its silence Congress specifically intended that no knowledge or ability to control is required. Under that reasoning, however, Congress must also have specifically intended that the drug-related criminal activity could occur anywhere and at anytime in order to be cause for termination of the lease since the statute is silent as to when the drug-related criminal activity must occur and as to what is meant by "off-premises." In other words, such reasoning leads to the conclusion that Congress specifically intended that if the tenant invites a guest into her apartment and the guest engaged in drug-related criminal activity five years earlier on the other side of the country, the drug-related criminal activity of the guest could be cause for termination, regardless of whether the tenant had any knowledge or reason to know of the activity. The Court doubts that Congress specifically intended that a tenant could be terminated under such unreasonable circumstances. It is more likely that Congress did not address in the statute when the drug-related criminal activity must occur in relation to the termination of the lease just as it did not address whether a tenant must have knowledge of, or the ability to control, the wrong-doer's conduct in order for such conduct to be grounds for terminating the tenant's lease.

The legislative history is inconclusive as to whether Congress intended to permit the termination of "innocent" tenants' leases. Plaintiffs have cited legislative history that suggests Congress specifically did not intend to allow evictions under such circumstances. *See*

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941 ("eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity"); S. Rep. no. 316, 101st Cong., 2d Sess. 179 (1990) reprinted in 1990 U.S.C.C.A.N. 5763, 5889 ("The Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit [sic]"); *see also Charlotte Housing Authority v. Patterson*, 120 N.C. App. 552, 464 S.E.2d 68 (1995) (holding that 42 U.S.C. § 1437d(1)(6) is silent as to the requirement of personal fault of the tenant and that the legislative history "reveals a clearly expressed legislative intent that eviction is appropriate only if the tenant is personally at fault for breach of the lease, i.e., if the tenant had knowledge of the criminal activities, or if the tenant had taken no reasonable steps under the circumstances to prevent the activity").

Defendants respond that the authors of the Senate reports cited by plaintiffs simply did not prevail in their attempts to include language in the statute which would have protected "innocent" tenants. They cite authority which suggests Congress did intend to permit the termination of leases of "innocent" tenants. For example, in an expired emergency supplemental appropriations measures, Pub. L. No. 101-45, § 404(a), 103 Stat. 97, 128-29 (1989), Congress directed the Secretary to issue waivers of certain administrative grievance procedures "as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is

not involved in such activity to continue tenancy." Defendants contend that the "innocent" tenants would not need the protections of additional grievance procedures if the law did not already permit the termination of their tenancies. They also cite floor debate on the bill which evinces concern over drug use in public housing by people "who are not on leases." *See* 134 Cong.Rec. 33148 (daily ed. Oct. 21, 1988).

This legislative history, however, like the statute itself, is silent on the issue of the tenant's knowledge of or ability to control the wrong-doer's criminal behavior. For example, the temporary extra "protection" applied to household members who were not *personally involved* in the criminal activity, but who may have had knowledge or a reason to know of the drug-related criminal activity. The statute says nothing about tenants who did not know, and had no reason to know, of the criminal activity. In other words, if Congress had intended that a tenant's lease could not be terminated without the tenant having knowledge or the ability to control the drug-related criminal activity, the temporary protection still would have been necessary since the statute would permit terminating the leases of tenants who knew of the activity but were not personally involved. Similarly, concern about drug use by people who are not on leases does not equate with an intention to permit termination of the leases of "innocent" tenants. Such a concern may be addressed by terminating the leases tenants who knowingly permit such criminal behavior or knowingly allow guests into public housing who they have reason to know may engage in criminal behavior.

In sum, the legislative history is, at best, inconclusive. It is significant that defendants cannot identify anything in the legislative history that unambiguously indicates that Congress specifically intended that a public housing authority may terminate a tenant's lease for drug-related criminal activity of someone else even when the tenant had no knowledge, or no reason to know, of the criminal activity and no ability to control the person for whom HUD wants to hold the tenant responsible.

Since Congress has not spoken on the issue of terminating "innocent" tenants' leases, the next inquiry is whether HUD's interpretation of the statute as permitting termination under such circumstances is a permissible construction of the statute. *See Chevron U.S.A., Inc.*, 467 U.S. at 842-43. The Court's determination must be guided by the statute itself which provides that public housing authorities shall not utilize leases which contain "unreasonable terms and conditions." 42 U.S.C. § 1437d(l)(1). The only federal court which has addressed what constitutes an "unreasonable" lease term in a published opinion interpreted the clause to mean that the lease term

> must be rationally related to a legitimate housing purpose. In applying this test, the crucible of reasonableness will be defined by the particular problems and concerns confronting the local housing authority. Lease provisions which are arbitrary and capricious, or excessively overbroad or underinclusive, will be invalidated.

Richmond Tenants Organization, Inc. v. Richmond Redevelopment and Housing authority, 751 F. Supp. 120, 1205 (E.D. Va. 1990). The court concluded, after a

trial on the merits, that a lease provision which prohibited tenants from the illegal use, sale or distribution of drugs and alcoholic beverages *off* the premises was unreasonable. *See id.* at 1206.

On a motion to dismiss, the Court must accept plaintiffs' allegations as true and construe them in a light most favorable to the plaintiffs. *See School of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Based on the allegations in the complaint, it does not appear as a matter of law that terminating the leases of "innocent" tenants is reasonable. The Court simply cannot conclude—without any evidence before it—that the statute is not overbroad by permitting evictions of tenants who themselves had no knowledge and no reason to know of the drug-related criminal activity of another, or of tenants who had no ability to control the alleged wrong-doer. Accordingly, plaintiffs have stated a claim under the APA.

D. *The Section 1983 Claim.*

42 U.S.C. § 1983 creates a cause of action against *persons* who act "under color of state law" to deprive citizens of their federal rights. Plaintiffs' section 1983 claims against HUD and OHA must therefore be dismissed as HUD and OHA are not "persons" within the meaning of the statute. *See Hurt v. Philadelphia Housing Authority*, 806 F. Supp. 515, 524 (E.D. Pa. 1992). Plaintiffs argue, citing *Savage v. Toan*, 636 F. Supp. 159 (S.D.N.Y. 1986), that they may state a claim against a federal official of HUD if HUD pressured a local entity (here, OHA) to violate the plaintiff's federal rights. *See Hurt*, 806 F. Supp. at 523 (to state a section 1983 claim against a federal official, the complaint must plead specific acts taken by the federal

official together with local officials toward some unlawful end). The first amended complaint does not name any federal official, let alone include the required specific allegations. As this is defendants' first motion to dismiss, the Court will grant plaintiffs leave to amend to add a federal official defendant and make the required allegations, provided they can do so consistent with Federal Rule of Civil Procedure 11.

OHA's Director Harold Green argues that the section 1983 claim against him must be dismissed because the lease provision pursuant to which OHA terminated plaintiffs' tenancies, paragraph 9(m), is mandated by federal regulations and as a result, he—a local government official—was not acting under color of state law. The federal regulations, however, merely permit termination of the lease of an "innocent" tenant, they do not mandate termination of the tenancy. Thus, Green was acting under color of state law when he, a state actor, exercised OHA's discretion to serve plaintiffs with three-day notices to quit.

E. *The ADA Claims.*

Defendants contend that neither Rucker nor Walker has stated a claim for violation of the ADA. Plaintiffs may not state a claim under the ADA against HUD as the ADA does not apply to actions taken by the federal government. *See* 42 U.S.C. § 12131(1), 12132 (omitting federal entities from definition of pertinent "public entity"; 12181-82 (prohibiting discrimination by private entities in public accommodation).

The Rehabilitation Act, on the other hand, does apply to federal entities. Since giving plaintiffs leave to amend to state a claim under the Rehabilitation Act would be futile if they cannot state such a claim, the

Court will address whether under the facts alleged in the first amended complaint plaintiffs can state such a claim.

The Rehabilitation Act prohibits excluding a person from participation in a federal program "solely by reason of his or her disability." *See* 29 U.S.C. § 794(a). To prevail on a Rehabilitation Act claim a plaintiff must show "(1) he is an 'individual with a disability'; (2) he is 'otherwise qualified' to receive the benefit; (3) he was denied the benefit of the program solely by reason of his disability; and (4) the program receives federal financial assistance." *Weinreich v. Los Angeles County Metropolitan Transp. Authority*, 114 F.3d 976, 978 (9th Cir.), *cert. denied*, 522 U.S. 971, 118 S. Ct. 423, 139 L.Ed.2d 324 (1997). Plaintiff Rucker argues that HUD's regulation excludes her from the public housing program by permitting the termination of her tenancy for her mentally disabled daughter's conduct. Walker argues that HUD's regulation excludes him from public housing on account of his disability by permitting the termination of his tenancy for the conduct of his caregiver—conduct of which he was not aware and could not control.

Plaintiff Rucker's claim must fail because she does not allege that *she* has a disability.

Plaintiff Walker's claims similarly must fail because HUD's regulation does not mandate his eviction; rather, it gives the housing authority discretion as to when to evict. The housing authority's discretion must be exercised consistent with HUD's edict that the housing authorities not discriminate against anyone on account of a disability. *See* 24 C.F.R. § 966.7(a) ("[f]or all aspects of the lease and grievance procedures, a handicapped person shall be provided reasonable accommodation to the extent necessary to provide the handicapped person with an opportunity to use and occupy the dwelling unit equal to a non-handicapped person"). Accordingly, HUD's regulation does not deprive Walker of participation in a federal program on account of his disability. Plaintiffs, therefore, will not be granted leave to amend to state a Rehabilitation Act claim against HUD.

Plaintiffs Rucker and Walker also make a claim for violation of the ADA against defendants OHA and Green. The ADA provides in relevant part that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

42 U.S.C. § 12132. To prove a public program violates the ADA a plaintiff must show that

> (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by a public entity, and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

Weinreich, 114 F.3d at 978.

As plaintiff Rucker does not and cannot allege that she is a "qualified individual with a disability," she cannot state a claim under the ADA.

OHA argues that plaintiff Walker similarly cannot state a claim because paragraph 9(m) of the lease treats all tenants equally. A tenant may be evicted for the drug-related criminal activity of a household member even if the tenant did not know of or could not control the household member's conduct. Therefore, OHA argues, Walker's inability to control his caregiver due to his disability is immaterial and OHA has not as a matter of law excluded Walker from participation in public housing on account of his disability.

A tenant can ensure that she will not forfeit her tenancy pursuant to lease paragraph 9(m) for the conduct of a household member, guest or other person which the tenant controls by choosing not to have any household members or guests. Plaintiff Walker, on the other hand, does not have that choice. He alleges that he requires a caregiver in order to live. *Cf. Green v. Housing Authority of Clackmas County*, 994 F. Supp. 1253 (D. Or. 1998) (ADA required housing authority to modify "no dogs" policy to allow a hearing impaired tenant to have hearing assistance dog). Based on the allegations of the first amended complaint, OHA's eviction of Walker may thus violate the ADA since paragraph 9(m) places him at more risk for forfeiture of his tenancy than other tenants who do not require in-home care.

OHA also argues that plaintiff Walker's disability cannot be reasonably accommodated other than to grant him a blanket exemption from paragraph 9(m) which, OHA contends, is not reasonable and would permit a disabled person's apartment unit to become a drug haven. Based on the allegations of the complaint, however, the Court cannot rule as a matter of law that

no reasonable accommodation exists and that nothing short of a blanket exemption from the rule prohibiting drug-related criminal activity will accommodate Walker's interests and that of the OHA and the other public housing tenants. *See Niece v. Fitzner*, 922 F. Supp. 1208, 1218 (E.D. Mich. 1996) (concluding that "reasonable accommodation" is generally a question of fact inappropriate for resolution on a motion to dismiss).

F. *State Law Claims.*

Plaintiffs also allege that paragraph 9(m) of the lease is unenforceable under California law as a contract of adhesion containing unconscionable terms. (FAC ¶ 43.) As a preliminary matter, as HUD is not a party to the contract at issue plaintiff may not state a contract claim against it. In any event, defendants argue that the unenforceable contract claim is preempted because, among other reasons, Congress has already mandated that public housing leases not contain any unreasonable terms. If the Court ultimately concludes that paragraph 9(m) is reasonable, a conclusion that it nonetheless is unconscionable under state law would conflict with federal law. Accordingly, plaintiffs' "unconscionable" contract claim is preempted. *See Gibbons v. Ogden*, 9 Wheat. 1, 22 U.S. 1, 210, 6 L.Ed. 23 (1824); *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L.Ed.2d 180 (1962); *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997).

Plaintiffs also argue in their memoranda that paragraph 9(m) of the lease is ambiguous as to what it means for a tenant "to assure" that the tenant and a member of the tenant's household not engage in drug-related criminal activity. Plaintiffs have not made the

"ambiguous language" claim in their first amended complaint.

Nonetheless, defendants argue that the proposed "ambiguous language" contract claim is also preempted since HUD's regulations require public housing authorities to include the "to assure" language in their leases. As defendants must admit, however, Congress did not mandate that public housing leases include a provision requiring tenants "to assure." That language was added by HUD. To the extent that language may make the lease provision ambiguous, plaintiffs have stated a claim. *See American Apartment Management Co. v. Phillips*, 274 Ill. App.3d 556, 566, 210 Ill. Dec. 639, 653 N.E.2d 834, 840 (1995); *see also Diversified Realty Group, Inc. v. Davis*, 257 Ill. App.3d 417, 421-22, 195 Ill. Dec. 617, 628 N.E.2d 1081, 1084-85 (1993) (strict liability provision of lease, while federally mandated, must be read in connection with other terms of lease under contract law). The fact that HUD adopted the language is immaterial. The Court is not aware of any law which would allow HUD to require housing authorities to use ambiguous lease language and then deprive the affected tenants of arguing that the lease provision is ambiguous. To put it another way, a conclusion that the lease language is ambiguous will not conflict with Congress's directive that drug-related criminal activity may be cause for termination of a lease.

OHA argues even if the "ambiguous language' claim is not preempted, the claim must nonetheless fail because the court in *City of South San Francisco Housing Authority v. Guillory*, 49 Cal. Rptr.2d 367, 41 Cal. App.4th Supp. 13 (1995) concluded after a trial upon stipulated facts that the words "to assure" in the lease

at issue there were not ambiguous. The *Guillory* court, however, was interpreting a similar, but different, lease between parties not present in this lawsuit. The parties to this action and this Court are not bound by that decision. Accordingly, the Court will grant plaintiffs leave to amend to make a contract claim which alleges that paragraph 9(m) is ambiguous under state law.

G. *Claims Against Defendant Green.*

Defendant Green makes additional arguments as to why he cannot be individually liable in this action. Plaintiffs, however, are not making claims against him in his individual capacity. Rather, they have named in his official capacity only as the Director of Oakland Housing Authority. (FAC ¶ 2.) Since the complaint also names OHA, and OHA is the real party in interest, the claims against defendant Green in his official capacity will be dismissed as redundant except for the section 1983 claim. *See Walston v. City of Port Neches*, 980 F. Supp. 872, 878 (D. Tex. 1997).

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

Plaintiffs move for an order enjoining the unlawful detainer action and enjoining the enforcement of HUD's regulation and paragraph 9(m) of OHA's form lease without evidence of a tenant's personal participation in, prior knowledge of, or actual ability to prevent the drug-related criminal activity.

To be entitled to a preliminary injunction, plaintiffs must show "either (1) a combination of probable success

on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." *Miller v. California Pacific Medical Center*, 19 F.3d 449, 456 (9th Cir. 1994).

A. *The Merits.*

The Court concludes that plaintiffs have shown, at a minimum, the existence of serious questions and a fair chance of success with respect as to whether OHA's termination of a tenant's lease for a household member's drug-related criminal activity outside of the tenant's unit is unreasonable within the meaning of 42 U.S.C. § 1437d(l)(1) when the tenant had no knowledge of, and no reason to know of, the activity. In opposition to plaintiffs' motion the defendants have not offered any evidence as to how terminating the lease of an "innocent" tenant for conduct which occurred outside of the tenants's apartment unit is rationally related to a legitimate housing goal and constitutional.

The policy on its face appears irrational because evicting the tenant will not reduce drug-related criminal activity since the tenant has not engaged in any such activity or knowingly allowed such activity to occur. To the contrary, terminating the leases of "innocent" tenants may facilitate, or least conceal, criminal drug-activity by ensuring that tenants who learn of such activity by their household members or guests will not report the activity to the public housing or other authorities. If a tenant were to report such conduct she would be advising the housing authority that she is in breach of the lease and subject to termination of her

tenancy since her guest or household member engaged in drug-related criminal activity.

The only "rational relationship" which is immediately apparent to the Court is that household members may be less likely to engage in drug-related criminal activity on or off the premises if they know their conduct could lead to the eviction of the tenant. Such a rationale, however, would appear to violate the first amendment guarantee of freedom of association. *See Tyson v. New York City Housing Authority*, 369 F. Supp. 513, 530 (S.D.N.Y. 1974) (holding that complaint that challenges eviction of tenant for conduct of adult son who did not live with tenant states a claim for violation freedom of association). For example, under that rationale, one could argue that husbands should be held responsible for the crimes of their wives because the wives will be less likely to commit crimes if they know the government will punish their husbands for their crimes. In such a situation, and the situation present here, the person penalized is not being punished for his own conduct and failure to police his own apartment or home, but rather because he lives with someone who committed a drug-related crime while outside of the apartment or home.

Defendants argue that with respect to drug-related criminal activity outside of the apartment the tenant is not being punished for her association with the household member, but rather for her failure to ensure that the household member does not ever—in or outside the apartment unit—engage in drug-related criminal activity. *See Chavez v. The Housing Authority of El Paso*, 973 F.2d 1245, 1248 (5th Cir. 1992). But the same argument could be made with respect to the husband/wife

analogy; the husband is being punished for his failure to ensure that his wife does not commit a crime even if he had no way of knowing she was likely to commit a crime. To say that a person is being held responsible for their failure to do something necessarily implies that they *could* do something. *See Tyson*, 369 F. Supp. at 520 ("[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiff's own conduct"). If they could not do something they are in practice being punished merely for their association with the wrong-doer.

The Court is not persuaded, however, that OHA should be preliminarily enjoined from terminating the leases of tenants for drug-related criminal activity that occurs in the tenant's unit. A tenant may control what occurs in her unit by ensuring that no one is present when she is not and searching her apartment and perhaps, her guests and household members before they enter. In other words, terminating the lease of a tenant for her failure to maintain a drug-free environment in her apartment holds the tenant responsible for something over which she has some control. Eviction under such circumstances appears rationally related to a legitimate public housing goal and constitutional.

Plaintiffs argue that the presumption that a tenant has control over what occurs in her apartment should be a rebuttable presumption for there may be situations when that presumption simply does not apply. Plaintiff Walker may present such a situation. He is unique, however, because it is alleged that he could not choose not to let his caregiver into his apartment and because he requires his caregiver to live as a result of his disability. He further alleges that he would not be physical-

ly able to search his caregiver. Thus, the ADA may require that defendants modify their policy to accommodate his disability. Accordingly, the Court will enjoin the eviction of plaintiff Walker on account of the drug-related criminal activity of the caregiver. The Court will not enjoin all OHA evictions for drug-related criminal activity in the tenant's apartment even if the tenant did not know, and had no reason to know of, or ability to control, the drug-related criminal activity. The Court cautions, however, that it is not foreclosing plaintiffs' claim on this issue. The Court's ruling herein is based merely upon the showing that the parties have made thus far.

B. *The Balance of the Hardships.*

The balance of the hardships weighs strongly in favor of granting preliminary injunctive relief. If OHA's prosecution of the unlawful detainer actions against plaintiffs or its termination of the leases of other "innocent" tenants are not enjoined, the plaintiffs and other "innocent" tenants will lose their homes. OHA, on the other hand, has not offered any evidence of the hardship it and the other public housing tenants will suffer if tenants who themselves have not engaged in drug-related criminal activity are not evicted pending trial in this action. Such a hardship might be present if the Court were to enjoin OHA from terminating the leases of tenants who themselves engage in drug-related criminal activity or who knowingly permit such activity by guests or household members. The Court, however, has not done so.

C. *The Bond.*

Federal Rule of Civil Procedure 65(c) requires "the giving of security by the applicant, in such sum as the court deems proper" before a preliminary injunction may issue. Nonetheless, "[t]he court has discretion to dispense with the security requirement where giving security would effectively deny access to judicial review, . . . or where suit is brought on behalf of a class of poor persons." *Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987). This lawsuit is brought by plaintiffs proceeding *in forma pauperis*. Moreover, defendants have not asked for a bond. The Court will therefore exercise its discretion not to require a bond since to do so may deprive plaintiffs of their right to judicial review.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are GRANTED in part and DENIED in part as follows:

1. Defendant Green's motion to dismiss the claims against him is GRANTED as to all claims except the 42 U.S.C. § 1983 claim, without leave to amend;

2. HUD's motion to dismiss the APA claim is DENIED;

3. HUD's motion to dismiss the section 1983 claim is GRANTED with 30 days leave to amend;

4. HUD's motion to dismiss the ADA claim is GRANTED without leave to amend;

5. HUD's motion to dismiss the state contract claim is GRANTED without leave to amend;

6. OHA's motion to dismiss the section 1983 claim is GRANTED without leave to amend;

7. OHA'S motion to dismiss the ADA claim is GRANTED as to plaintiff Rucker without leave to amend and DENIED as to plaintiff Walker; and

8. OHA's motion to dismiss the state contract claim is GRANTED with 30 days leave to amend.

The Court also concludes that plaintiffs have shown, at a minimum, that there is a serious question and a fair chance of success on the merits as to the lawfulness of OHA's termination of the leases of "innocent" tenants for drug-related criminal activity that occurs outside of the tenant's unit, and that the balance of hardships weighs in favor of enjoining OHA's termination of the tenants' leases under such circumstances pending trial in this lawsuit. Plaintiff Walker has also demonstrated a serious question with respect to whether OHA's eviction of him for the drug-related criminal activity of his caregiver violates the ADA and that the balance of hardships weighs in favor of enjoining the prosecution of the unlawful detainer action against him on this ground. Accordingly,

IT IS HEREBY ORDERED that defendant Oakland Housing Authority ("OHA"), its officers, agents, servants, employees, and attorneys, are preliminarily enjoined, until further order of this Court, from terminating the leases of tenants pursuant to paragraph 9(m) of the "Tenant Lease" for drug-related criminal activity that does not occur within the tenant's apartment unit

when the tenant did not know of, and had no reason to know of, the drug-related criminal activity. OHA is not preliminarily enjoined from evicting tenants pursuant to paragraph 9(m) of the Tenant Lease for drug-related criminal activity in the tenant's apartment, regardless of whether the tenant knew, or had reason to know, of the criminal activity, except as is set forth below with respect to plaintiff Walker.

IT IS FURTHER ORDERED that defendant OHA, its officers, agents, servants, employees, and attorneys, are preliminarily enjoined, until further order of this Court, from prosecuting the Oakland-Piedmont-Emeryville Judicial District, Alameda County eviction proceedings in *Oakland Housing Authority v. Hill*, No. 013198, *Oakland Housing Authority v. Lee*, No. 013197, *Oakland Housing Authority v. Walker*, No. 011040 on the ground that the defendants in those actions violated paragraph 9(m) of the Tenant Lease.

IT IS FURTHER ORDERED that plaintiffs shall not be required to post a bond pursuant to Fed.R.Civ.P. 65(c) as to require them to do so would effectively deny them judicial review of their complaints.

IT IS SO ORDERED.

APPENDIX E

STATUTORY AND REGULATORY PROVISION INVOLVED

1. Section 1437d(*l*) of Title 42 of the United States Code (Supp. IV 1998) provides:

(*l*) Leases; terms and conditions; maintenance; termination

Each public housing agency shall utilize leases which—

(1) have a term of 12 months and shall be automatically renewed for all purposes except for noncompliance with the requirements under section 1437j(c) of this title (relating to community service requirements); except that nothing in this subchapter shall prevent a resident from seeking timely redress in court for failure to renew based on such noncompliance;

(2) do not contain unreasonable terms and conditions;

(3) obligate the public housing agency to maintain the project in a decent, safe, and sanitary condition;

(4) require the public housing agency to give adequate written notice of termination of the lease which shall not be less than—

(A) a reasonable period of time, but not to exceed 30 days—

(i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or

(ii) in the event of any drug-related or violent criminal activity or any felony conviction;

(B) 14 days in the case of nonpayment of rent; and

(C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply;

(5) require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;

(6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy;

(7) specify that with respect to any notice of eviction or termination, notwithstanding any State law, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents,

records, or regulations directly related to the eviction or termination;

([8]) provide that any occupancy in violation of section 13661(b) of this title (relating to ineligibility of illegal drug users and alcohol abusers) or the furnishing of any false or misleading information pursuant to section 13662 of this title (relating to termination of tenancy and assistance for illegal drug users and alcohol abusers) shall be cause for termination of tenancy;

(9) provide that it shall be cause for immediate termination of the tenancy of a public housing tenant if such tenant—

(A) is fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the individual flees, for a crime, or attempt to commit a crime, which is a felony under the laws of the place from which the individual flees, or which, in the case of the State of New Jersey, is a high misdemeanor under the laws of such State; or

([B]) is violating a condition of probation or parole imposed under Federal or State law.

For purposes of paragraph (5), the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 802 of title 21).

2. Part 966.4(f) of Title 24 of the Code of Federal Regulations provides in pertinent part:

(f) *Tenant's obligations.* The lease shall provide that the tenant shall be obligated:

* * * * *

(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or

(B) Any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(ii) For purposes of subparts A and B of this part 966, the term *drug-related criminal activity* means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

3. Part 966.4(*l*) of Title 24 of the Code of Federal Regulations provides in pertinent part:

(*l*) *Termination of tenancy and eviction.*—

* * * * *

(2) *Grounds for termination of tenancy.*

(i) The PHA may terminate the tenancy only for serious or repeated violation of material terms of the lease, such as failure to make payments due under the lease or to fulfill tenant obligations, as described in paragraph (f) of this section, or for other good cause (including failure to accept the PHA's offer of a lease revision in accordance with paragraph (l)(2)(iv) of this section).

(ii) Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents.

(B) Any drug-related criminal activity on or near such premises.

* * * * *

(5) *Eviction for criminal activity.*—

(i) *PHA discretion to consider circumstances.* In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family

members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

(ii) *Notice to Post Office.* When a PHA evicts an individual or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity, the PHA shall notify the local post office serving that dwelling unit that such individual or family is no longer residing in the dwelling unit. (So that the post office will terminate delivery of mail for such persons at the unit, and that such persons not return to the project for pickup of the mail.)

(3) (2)

Nos. 00-1770 / 00-1781

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

and

OAKLAND HOUSING AUTHORITY and HAROLD DAVIS,

v.

Petitioners,

PEARLIE RUCKER, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Respondents Pearlie Rucker, Herman Walker, Willie Lee and Barbara Hill (collectively "Respondents") respectfully oppose the petitions for writ of certiorari filed by the United States Department of Housing and Urban Development ("HUD") and the Oakland Housing Authority ("OHA") (collectively "Petitioners") in this consolidated memorandum.

I. PETITIONERS FAIL TO ESTABLISH A BASIS FOR CERTIORARI

A. No Inter-Circuit Or State Court Conflict Exists.

As an initial matter, petitioners fail to establish the conflict between decisions contemplated under Supreme Court Rule 10 for a grant of certiorari. No other United States court of appeals has construed section 1437d(*l*)(6) or otherwise considered the issues presented in *Rucker*. Consequently, the Ninth Circuit's opinion raises no inter-circuit conflict necessary to support review by this Court.

Petitioners' reliance on two state supreme court decisions is misplaced. Petitioners offer the state court decisions in *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504 (Tenn. 2001) (*"Thompson"*) and *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999) (*"Lor"*) as evidence of a conflict meriting certiorari. A review of these decisions demonstrates that neither case presents a substantive conflict with *Rucker* warranting review by this Court.

The holding in *Thompson* is in fact entirely consistent with *Rucker*. In *Thompson*, the housing authority invoked HUD's "one strike" lease provision to evict a tenant for the drug activity of a guest occurring inside the tenant's apartment. The court construed the lease term in light of section 1437d(*l*)(6) and Tennessee state contract law, and held that the statute permits a housing authority to evict a tenant for the drug activity of a guest "only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity." *Thompson*, 38 S.W.3d at 505.

Far from raising a conflict, this holding is in harmony with the Ninth Circuit's finding that section 1437d(*l*)(6) prohibits eviction of a tenant who "did not know of or have any reason to know of [drug] activity or took all reasonable steps to prevent the activity from occurring." HUD App. at 2a. Both courts agree that a tenant cannot be evicted for the alleged criminal activity of a guest without a finding of knowledge and control on the tenant's part. Consequently, future application of *Thompson* and *Rucker* on the issue of the eviction of a tenant for a guest's drug activity will in no way result in a "different treatment among similarly situated low income housing tenants" as OHA suggests. OHA Pet. at 12.

Petitioners' heavy dependence on *dicta* in *Thompson* does not create a conflict with *Rucker*. After overlooking the fact that *Rucker* and *Thompson* agree on the standard for eviction of a tenant in the guest context, Petitioners hope to establish a conflict by citing comments in *Thompson* that "strict liability" might apply in cases involving drug activity by a tenant's household member rather than a guest. Petitioners' citations are misplaced

because, as a plain reading of *Thompson* shows, these comments are pure *dicta*. The only issue before the Tennessee court was the application of the "one-strike" lease provision to criminal drug activity by a tenant's guest. As demonstrated, *Thompson's* holding on that issue is entirely consistent with *Rucker*. The issue of alleged drug possession by a household member was not before the Tennessee court, and its asides on a tenant's liability for household member drug activity – on which petitioners hang their assertion of a conflict – have no authority under Tennessee law. *See Shepherd Fleets, Inc. v. Opryland, U.S.A.*, 759 S.W.2d 914, 922 (Tenn. App. 1988) ("[c]ourt decisions must be read with special reference to the questions involved and necessary to be decided, and language used which is not decisive of the case . . . is not binding as precedent"); *Vinson v. Nashville, Chattanooga & St. Louis Ry.*, 321 S.W.2d 841, 845 (Tenn. App. 1958) ("a case is authority for the point decided, and nothing more"). The Tennessee court's dicta fails to support petitioners' writ request. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994) ("[i]t is to the holdings of our cases, rather than their dicta, that we must attend").

Petitioners' reliance on the Minnesota Supreme Court's decision in *Lor* is equally unavailing. *Lor* does not address at all the substantive issues in *Rucker*, and the issues that petitioners urge this Court to review, about whether and to what extent HUD's "one-strike" eviction policy accords with the meaning of and congressional intent in section 1437d(*l*)(6). Rather, the issue decided in *Lor* was whether a Minnesota state court has the equitable discretion to modify or overrule a decision by the PHA to evict a tenant because eviction would cause a severe

hardship. *Lor*, 591 N.W.2d at 702-703. The Minnesota court did not even mention, let alone analyze or decide, the statutory and constitutional issues on which the Ninth Circuit based the *Rucker* opinion. The opinion focussed only on the zones of equitable discretion between Minnesota state courts and the local federal housing authorities. *Lor* cannot be invoked as precedent for the proposition that petitioners assert and therefore presents no substantive conflict with the Ninth Circuit's findings in *Rucker*.

B. The *Rucker* Litigation Is Ongoing And Does Not Present A Final Resolution Of This Case On The Merits.

Rucker merely affirmed the grant of a preliminary injunction and allowed the underlying District Court case to proceed to final resolution. Although Petitioners try to slight the significant fact that the underlying litigation in *Rucker* is still at an early stage, this Court has repeatedly emphasized that, "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (holding in review of preliminary injunction decision that "[t]he decree that was sought to be reviewed by certiorari . . . was not a final one, a fact that *of itself alone furnished sufficient ground for the denial of the application*") (emphasis added); *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (declining to review a court of appeals decision that made final legal rulings but remanded for additional factual findings, noting that "because the Court of Appeals remanded the case, it is not yet ripe for

review by this Court.") Here, because the Ninth Circuit's opinion merely affirms a preliminary injunction, the case must now proceed before the district court for additional findings on the merits. That circumstance alone provides a sufficient basis for denying review of *Rucker*.

Petitioners' request for interlocutory review is particularly inappropriate because further proceedings in this case might resolve not only factual disputes but also significant legal issues affecting the very questions that petitioners urge the Court to resolve at this time. Contrary to HUD's assertion, the Ninth Circuit did not "definitively interpret[ ] Section 1437d(*l*)(6)." HUD Pet. at 29-30. *Rucker* does not even purport to address several key issues regarding the statute, including the allocation of the burden of proof under the "one-strike" lease provision and the showing of knowledge (if any) required in cases where drug activity occurs inside a tenant's apartment unit.[1] Given the substantive legal issues that remain

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[1] The issue of drugs allegedly within a HUD unit was not presented to the court of appeals. In issuing the preliminary injunction in this case, the district court made clear that its finding regarding section 1437d(*l*)(6) applied only where the drug activity "does not occur within the tenant's apartment unit." HUD App. at 165a-66a. The district court expressly declined to rule on what standard applies in circumstances where criminal activity occurs *inside* a tenant's apartment, *id.*, and the Ninth Circuit did not resolve that issue. The Ninth Circuit also expressly reserved the question whether the statute authorizes eviction if a tenant had knowledge of a household member's drug activity but could not realistically exercise control over it. "The district court's injunction does not address the issue of whether tenants who have knowledge of off-premises drug activities by household members may be evicted if they attempt in good faith to prevent their household

to be resolved regarding section 1437d(*l*)(6), *Rucker* does not present a final and comprehensive ruling on the statute that might be appropriate for review prior to final judgment. Rather, review at this time of the narrow findings in *Rucker* would result in piecemeal and inefficient consideration of the issues raised in this case related to the "one-strike" statute.

Petitioners' formulation of the questions presented for review improperly suggests that the Ninth Circuit resolved these and other important issues. OHA asks the Court to answer whether an "innocent owner *defense*" is available under the statute. OHA Pet. at (i) (emphasis added). HUD asks the Court to determine whether the statute applies "regardless of *whether it can be shown* that the tenant knew, or had reason to know, of the drug activity." HUD Pet. at (i) (emphasis added). These questions imply that the Ninth Circuit ruled on allocating the burden of proof under section 1437d(*l*)(6), when *Rucker* does not resolve that issue. Petitioners' questions also ignore the fact that *Rucker* leaves a host of issues open for the district court to consider and rule on as the underlying litigation moves forward. Those issues have not yet been resolved in this case, and the broad questions that petitioners present simply are not ripe for review in *Rucker*.

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members from engaging in such activity, but are unable to do so. Accordingly, we do not consider that question here." HUD App. at 28a, n.9. As the facts of this case are developed, the district court may well be required to resolve that legal question.

C. Petitioners' Enforcement Fears Are Sheer Speculation.

Petitioners' inflammatory suggestion that *Rucker* makes "the task of providing safe, decent and affordable housing to other tenants almost impossible," OHA Pet. at 13, *see also* HUD Pet. at 17-20, does not even remotely support certiorari. Petitioners hypothesize that *Rucker* will impose an "insurmountable" obstacle to eviction because housing authorities will rarely be able to prove a tenant's knowledge of drug activity. OHA Pet. at 12-13; HUD Pet. at 18-19. That speculation about the practical impact of *Rucker* relies on the false assumption that the decision definitively placed the burden on housing authorities to affirmatively prove a tenant's knowledge of drug activity. HUD Pet. at 18-19, OHA Pet. at 12-13. In fact, as noted above, the Ninth Circuit's opinion does not allocate the burden of proof in a "one-strike" eviction but simply holds that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." HUD App. at 26a. HUD concedes the absence of a definitive ruling of *Rucker* on the issue by stating that the Ninth Circuit fails to "discuss[ ] any issues concerning the allocation of the burden-of-proof." HUD Pet. at 13. Petitioners' parade of horribles is pure speculation without any grounding in *Rucker*.

Contrary to petitioners' musings, *Rucker* strengthens public housing by creating an extraordinary incentive for a tenant to exercise *all reasonable efforts* to prevent the

drug activity of their household members and guests. HUD App. at 26a. The Ninth Circuit's holding expressly applies only "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring." *Id.* Consequently, the Ninth Circuit's findings are fully consistent with the goals underlying section 1437d(*l*)(6).

D. Petitioners' Claim Of Error Does Not Support A Grant Of Review.

Petitioners' attack on the merits of *Rucker* also fails to warrant a grant of certiorari. "[T]his Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (J. Stevens, concurring); *see also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("this Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). Thus, petitioners' various quarrels with the Ninth Circuit's legal findings are irrelevant to this Court's consideration of petitioners' request for review.

Petitioners' attacks are also unfounded. In deciding the issues in this case, the Ninth Circuit properly applied the framework for analysis set out by this Court in *Chevron U.S.A. Inc. v. Nat'l Resource Defense Council*, 467 U.S. 837 (1984), and arrived at conclusions that are wholly consistent with this Court's established precedents. While Petitioners disagree with the Ninth Circuit's conclusions, litigants' disappointed expectations are not a basis for certiorari.

II. THE LOWER FEDERAL COURTS SHOULD ACT BEFORE THIS COURT INTERVENES

The scant record of lower federal court decisions on the government's application of section 1437d(*l*)(6) should count as a significant final factor against a grant of certiorari. The issues arising out of the government's practices should be allowed to percolate below to determine whether federal courts reach uniformity or conflict in interpreting section 1437d(*l*)(6) and to permit the lower courts to resolve questions left open by *Rucker*. Additional decisions interpreting and applying the statute will significantly contribute to determining whether to and to what extent this Court should act.

CONCLUSION

As Petitioners' own arguments suggest, the ultimate application and interpretation of section 1437d(*l*)(6) will depend upon the resolution of a myriad of fact issues left unresolved by the preliminary injunction affirmed in *Rucker*. For the reasons stated herein, *Rucker* is an inappropriate vehicle for this Court to address any of the purported claims raised by Petitioners. Consequently,

Respondents respectfully submit that the petitions for writ of certiorari of HUD and OHA should be denied.

Respectfully submitted

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(5)

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In the Supreme Court of the United States

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The statute at issue in this case is a critical tool for fighting the scourge of drug use and trafficking in public housing complexes and by public housing residents. See Pet. 15; Pet. App. 2a-3a. It provides that public housing leases must

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. 1437d(*l*)(6) (Supp. V 1999). This petition involves drug-related criminal activity by a "member of the tenant's household" that takes place outside the tenant's apartment. See Pet. 21 n.7. The court of appeals held that in those circumstances, "if a tenant has taken reasonable steps to

prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." Pet. App. 26a. In other words, if the tenant does not have knowledge of the drug activity, the tenant may not be evicted under Section 1437d(*l*)(6).

As we explain in the petition (at 24-29), the court of appeals' decision is seriously flawed, conflicting with the text, purposes, legislative history, and HUD's authoritative administrative interpretation of Section 1437d(*l*)(6). See also pages 8-9, *infra*. Indeed, in their brief in opposition, respondents offer no defense of the court of appeals' ruling on the merits. That erroneous ruling by the en banc Ninth Circuit—issued over four dissents—warrants review by this Court, because it conflicts with state supreme court precedent and seriously undermines the ability of Congress and public housing authorities to afford public housing tenants protection from drug use and violent criminal activity that is essential to the security of their homes.

A. The Question Presented Is Important

Section 1437d(*l*)(6) is based on the premise that drug-related criminal activity by someone living in or visiting a public housing unit poses a threat to innocent neighbors. Accordingly, a tenant who provides the wrongdoing individual the license to be on public housing premises is held responsible, regardless of whether the tenant knew of the drug-related criminal activity. As Judge Sneed explained, the provision thus "facilitates the eviction of truly culpable tenants" and "provides a credible deterrent against criminal activity." Pet. App. 61a.

The court of appeals' decision drains much of the significance from Section 1437d(*l*)(6) as a tool to end the "reign of terror" imposed by drug dealers on public housing tenants. 42 U.S.C. 11901(3); see Pet. 17-19. That is because it will be

difficult for housing authorities to prove the tenant's knowledge in cases like these, in which the drug activity takes place outside the presence of the tenant. In such cases, both the tenant and the person engaging in the criminal drug activity are likely to deny that the tenant had knowledge of it, and the housing authority is likely to find it difficult or impossible to challenge such denials. See Pet. 18-19.

Respondents argue (Br. in Opp. 7) that what they term our "speculation about the practical impact of [the court of appeals' decision] relies on the false assumption that the decision definitively placed the burden on housing authorities to affirmatively prove a tenant's knowledge of drug activity." Our argument, however, does not depend on any assumption about the burden of proof on that issue (although the Ninth Circuit's opinion does suggest in at least one place that the burden rests with the housing authority, see Pet. 17; Pet. App. 28a). Regardless of who has the burden of proof, the tenant and household member are likely to deny that the tenant had knowledge of the criminal activity, and the housing authority is likely to find it difficult or impossible to prove to the contrary. See Pet. 18-19. Accordingly, as the amici state, the en banc Ninth Circuit's decision "impos[es] unnecessary and improper legal impediments to removing criminal elements from public housing, thus diminishing the security and quality of life for all public housing residents." Br. of Amici Housing and Development Law Institute, et al., at 1.

B. There Is A Conflict With State Court Authority

Respondents contend (Br. in Opp. 1-4) that the decision of the court of appeals does not conflict with the decisions in *Minneapolis Public Housing Authority* v. *Lor*, 591 N.W.2d 700 (Minn. 1999), and *Memphis Housing Authority* v. *Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001), petition for cert. pending, No. 00-1861 (filed Jun. 13, 2001). Although a conflict is not a necessary condition to a grant of certiorari,

there is in fact a conflict in this case. The decision of the en banc court of appeals conflicts with the decision of the Minnesota Supreme Court in *Lor*, and it conflicts with the interpretation of Section 1437d(*l*)(6)—although not the holding—of the Tennessee Supreme Court in *Thompson*.

1. Contrary to respondents' claim (Br. in Opp. 4) that the Minnesota Supreme Court did not "analyze or decide" the issues that were before the Ninth Circuit in this case, the Minnesota Supreme Court in *Lor* in fact examined Section 1437d(*l*)(6), HUD regulations, and the Senate report relied upon by the Ninth Circuit. See 591 N.W.2d at 702-703. After considering those materials, the court concluded that the trial court "was bound to determine *only* whether [the tenant's] son engaged in [the] criminal activity and *thus* whether the lease was breached." *Id.* at 704 (emphasis added). The trial court in *Lor* had found that the tenant "did not have any knowledge of her son's criminal activity or reason to anticipate her son's acts," and the Minnesota Supreme Court did not question that finding. *Id.* at 702. Notwithstanding the finding that the tenant did not have knowledge of or reason to anticipate the household member's criminal activities, the Minnesota Supreme Court held that those activities "amount to a material breach of [the tenant's] lease." *Id.* at 704.[1]

After *Lor*, therefore, a tenant in Minnesota cannot claim that, because the tenant had no knowledge of the criminal activity, the tenant cannot be evicted under Section 1437d(*l*)(6) or its implementing regulations and lease terms. Nor could a Minnesota court enjoin a public housing authority from

[1] *Lor* involved a violent shooting by a household member, not drug-related activity, as in this case. Both types of conduct, however, are governed by the same terms in Section 1437d(*l*)(6) permitting eviction for the specified conduct (either threatening criminal conduct or criminal drug-related activity) that is "engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999). See Pet. 23.

evicting tenants who had no knowledge of the criminal activity. By contrast, the Ninth Circuit held that "the district court properly * * * enjoin[ed] [the public housing authority] from pursuing evictions under [a lease term dictated by Section 1437d(*l*)(6)] to the extent it seeks to do so for off-premises drug-related activity in which the tenant did not know of or have reason to know of the criminal activity." Pet. App. 28a. Under the Ninth Circuit's decision, the tenant's lack of knowledge precludes the public housing authority from evicting the tenant. The Ninth Circuit's decision thus conflicts with *Lor*.

2. The court of appeals' decision does not conflict in result with *Thompson*, because *Thompson* itself involved drug activity by a short-term guest (rather than, as in this case, a household member), and the Tennessee Supreme Court in *Thompson* construed Section 1437d(*l*)(6) to impose less strict standards on the tenant where a guest—rather than a household member—was involved in the drug activity. But the decision of the court of appeals does conflict with the interpretation of Section 1437d(*l*)(6) adopted by the Tennessee Supreme Court in *Thompson*. See Pet. 20-22. The Tennessee Supreme Court unequivocally stated that "both the language of [the tenant's] lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity." 38 S.W.3d at 512. By contrast, the Ninth Circuit in this case held that if a tenant, "for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member * * *, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." Pet. App. 26a. The tenant's lack of knowledge of the drug activity of a household member completely precludes eviction under the Ninth Circuit's decision; the tenant's lack of knowledge of the drug activity of a household member is of no relevance under the strict liability construction of Section 1437d(*l*)(6) adopted by the Tennessee Supreme

Court. At the very least, *Thompson* sets forth a considered, unequivocal, and very recent construction of Section 1437d(*l*)(6) by the highest court of Tennessee that is in direct conflict with the construction of the statute adopted by the en banc court of appeals in this case.[2]

C. The Case Is Ripe For Review

1. Respondents argue (Br. in Opp. 5) that the fact that "the Ninth Circuit's opinion merely affirms a preliminary injunction * * * alone provides a sufficient basis for denying review." The en banc court of appeals, however, went out of its way to make clear that its conclusions were not based on a tentative view of the meaning of the statute, but on "the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo" even when it arises on review of a preliminary injunction. Pet. App. 10a; see Pet. 29. And, as we explain in the petition, the court's conclusion regarding the meaning of Section 1437d(*l*)(6) was unequivocal. See Pet. 29. Indeed, the Ninth Circuit presumably decided to render an en banc decision for the very purpose of issuing a definitive ruling on an issue it regarded as being of circuit-wide significance. The Ninth Circuit's construction of Section 1437d(*l*)(6) will govern proceedings on remand in this case, as well as any subsequent appeal. It will also limit the ability of public housing authorities throughout the Ninth Circuit to use Section 1437d(*l*)(6) as a tool to fight drugs in public housing projects. The procedural posture of this case thus does not affect the need for this Court's review. See *United States* v. *Oakland Cannabis Buyers' Cooperative*, 121 S. Ct. 1711, 1716-1717 (2001) (noting grant of certiorari to review legal ruling at preliminary injunction stage).

[2] As we note in the petition (at 22 n.9), the issue in this case is frequently litigated, usually in the state courts. The decision of the court of appeals conflicts with most of the decisions of the lower state courts that have addressed the issue. See Pet. 22 n.9 (citing cases).

2. Respondents also argue (Br. in Opp. 5) that "further proceedings in this case might resolve not only factual disputes but also significant legal issues affecting the very questions that petitioners urge the Court to resolve at this time." In particular, respondents argue (*ibid.*) that the court of appeals did not address "the allocation of the burden of proof under the 'one-strike' lease provision and the showing of knowledge (if any) required in cases where drug activity occurs inside a tenant's apartment unit."

a. There is no reason to delay resolution of the question presented until the Ninth Circuit has finally determined (if it has not done so already, see Pet. 17) the allocation of the burden of proof as to the tenant's knowledge. Indeed, the question of how the burden of proof with respect to the tenant's knowledge should be allocated does not even arise under our view of Section 1437d(*l*)(6), since the ability of the public housing authority to act does not depend on the tenant's knowledge. The en banc Ninth Circuit's decision definitively holds that HUD's regulations are defective because they do permit eviction of owners who are unaware of the drug-related criminal activity. That holding is not subject to further revision on remand or in a later case. Thus, the decision in this case will have a very substantial impact, and warrants further review.

b. There is also no reason to delay review of the question presented here until the court of appeals decides the showing of knowledge required when the drug-related activity takes place within the tenant's housing unit.[3] In many cases

[3] In any event, the Ninth Circuit *did* address the showing required when the drug-related activity takes place in the apartment. The court understood that the district court's decision "creat[ed] a rebuttable presumption that a tenant controls what occurs in his or her unit," and found that approach "perfectly consistent with [its] interpretation of 'control' in § 1437d(*l*)(6)." Pet. App. 29a; see Pet. 17 n.5. Such a "rebuttable presumption" is problematic for the same reasons as the court of appeals' holding in this case, since it permits a tenant and household member to

(like the ones at issue here, see Pet. 21 n.7), the drug-related criminal activity can be expected to occur outside the tenant's apartment, even when it takes place (as it did in two of the instances at issue in this case, see Pet. 6-7) in the parking lot or other grounds of the public housing project. The Ninth Circuit definitively held that a tenant without knowledge of the drug activity cannot be evicted in such a case. For the reasons given above and in the petition, that holding warrants review.

3. HUD has promulgated new regulations implementing Section 1437d(*l*)(6) and related provisions. 66 Fed. Reg. 28,776 (May 24, 2001). The regulatory provisions governing this case, which involve the eviction of tenants for criminal drug activity of household members, are substantively unchanged, although they now take into account the 1996 amendment to Section 1437d(*l*)(6) (see Pet. 4-5), which changed the phrase "on or near such premises" to "on or off such premises." See 66 Fed. Reg. at 28,802-28,803 (promulgating 24 C.F.R. 966.4(f)(12)(ii)(B) and 24 C.F.R. 966.4(*l*)(5)(i)(B)).

The revised regulations do clarify the statutory terms "guest" and "other person under the tenant's control"—neither of which is directly at issue in this case. The overarching principle is that Section 1437d(*l*)(6) "is not qualified by whether the resident knew about or literally 'controlled' the guest's unlawful actions. Rather, the question is one of legal control; by 'control,' the statute means control in the sense that the tenant has permitted access to the premises."

---

avoid eviction by denying that the tenant had control over drug use in the apartment—a denial that the public housing authority will find it very hard as a practical matter to challenge. Indeed, the court of appeals' "rebuttable presumption" necessarily contemplates that there will be cases in which the presumption will be rebutted. In such cases, it presumably will be impossible to evict the tenant, regardless of the amount of drug-related criminal activity that occurs in the apartment.

66 Fed. Reg. at 28,781. The preamble to the new regulations accordingly explains:

> In order to distinguish the concept of 'other person' from 'guest,' HUD is defining 'other person under the tenant's control' to mean a short-term invitee who is not 'staying' in the unit. The rule specifies that such a person is only under the tenant's control during the period of the invitation and the person is on the premises because of that invitation.

Id. at 28,777-28,778. The regulations add that, "[a]bsent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not *under the tenant's control*." *Id.* at 28,792; see also *id.* at 28,782. Thus, the new regulations provide that drug-related criminal activity by a "guest" is a ground for eviction only if it occurs during the period when the person is a guest who is "staying in" the unit; drug-related criminal activity by someone who is an "other person under the tenant's control" is a ground for eviction only if it occurs on the public housing premises; and temporary commercial invitees are not considered to be "other person[s] under the tenant's control." See generally *id.* at 28,781-28,782 (preamble), 28,791-28,792 (§ 5.100 (definitions)), 28,802-28,803 (§ 966.4 (grounds for eviction)).

Those changes are entirely consistent with HUD's longstanding position with regard to the issues in this case, and they do not alter the analysis or affect the question presented. Indeed, because the en banc court of appeals rested its decision on what it concluded was the clear statutory mandate, see Pet. 29, a change in HUD's regulations could not affect the continued authority of that court's decision.

* * * * *

For the reasons given above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

RICHARD A. HAUSER
General Counsel
United States Department of
Housing and Urban Development

AUGUST 2001

MOTION FILED

JUN 2 2 2001

(4)

No. 00-1770

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

V.

PEARLIE RUCKER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*, HOUSING AND DEVELOPMENT LAW INSTITUTE AND NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, TOGETHER WITH BRIEF OF *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, TOGETHER WITH BRIEF OF *AMICI CURIAE*

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No. 00 - 1770

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner

V.

PEARLIE RUCKER, ET AL.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, HOUSING AND DEVELOPMENT LAW INSTITUTE AND NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, TOGETHER WITH BRIEF OF AMICI CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

MOTION FOR LEAVE TO FILE BRIEF
OF *AMICI CURIAE*

Housing and Development Law Institute, a District of Columbia not-for-profit corporation, (HDLI) and the National Association of Housing and Redevelopment Officials, a

District of Columbia not-for-profit corporation, (NAHRO) respectfully move this Court for leave to file the attached Brief of *Amici Curiae* in support of the Petition for Certiorari of the Delaware County Housing Authority.

Movants, HDLI and NAHRO, state as follows:

1. The purpose of this motion is to request leave of this Court to file a Brief of Amici Curiae in support of the Petition for Certiorari of the Delaware County Housing authority.

2. Movants, HDLI and NAHRO have a strong interest in the legal issues raised by this case.

Housing and Development Law Institute (HDLI) is a nationwide non-profit organization that acts as a legal resource to local public housing agencies and their legal counsel. Formed in 1984, HDLI has a present membership of approximately 300 local public housing agencies and law firms. In addition to publishing periodicals and other materials and conducting educational activities relating to the law of affordable housing, HDLI acts on its members' behalf with respect to legal aspects of state and federal housing policy.

The National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide non-profit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, as the National Association of Housing Officials (NAHO), NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. Its present membership numbers more than 8,400, including both agencies and public officials involved with affordable housing and community development throughout the Nation.

NAHRO's member agencies own or manage approximately 1,340,000 units of public housing (representing 99% of all public housing in the United States), and in addition, they administer rental assistance for more than 2,000,000 housing units. In all, NAHRO member agencies administer low-income housing in which approximately 7.6 million persons reside. NAHRO has played a key role in the development and interpretation of the nation's housing programs since their inception. With respect to matters of policy, NAHRO serves as the primary interface between the federal government and NAHRO's local housing agency members.

HDLI and NAHRO believe that the ruling in the court below, for which review by this Court is sought, is incorrect and that it unreasonably and improperly interferes with policies of the Federal Government as properly and lawfully articulated by the Petitioner, as well the lawful discretionary decisions of local housing authorities, addressing the problems of illegal drugs and crime in federally assisted public housing.

3. Written consent to the filing of a Brief of Amicus Curiae by HDLI and NAHRO in Support of the Petition for Writ of Certiorari has been given by:

Theodore B. Olson, Solicitor General of the United States, on behalf of the Federal Government

Susan T. Kumagai, Lafayette and Kumagai, LLP, San Francisco, California, counsel for the Oakland Housing Authority, petitioner in companion case No. 00-1784

John Murko, Oakland, California, Co-counsel for respondents has verbally declined to give written consent to the filing of a Brief of Amici Curiae by HDLI.and NAHRO.

Although the below named Co-counsel for such parties

and *amici* curiae in the court below have been requested in writing to provide written consent to the filing of a Brief of *Amicus Curiae* by HDLI and NAHRO, they have not responded:

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Oakland, California

Anne Tamiko Omura
Collective Legal Services
Oakland, California

Paul Renne
Whitty Somvichian
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Sundeen & Salinas
Oakland, California

William M. Simpich
Matthew Siegel
Oakland, California

The following other counsel appearing below as interested parties in this case have been requested in writing to provide written consent to the filing of a Brief of Amicus Curiae by HDLI and NAHRO and have not responded:

Gideon Anders
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Debra Gardner
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Legal Aid Foundation of Long Beach
Long Beach, California

Alan J. Schlosser
ACLU Foundation of Northern California
San Francisco, California

Dara Lynn Schur
Western Center on Law & Poverty, Inc.
Oakland, California

4. Counsel for Amici Curiae is a member in good standing of the bar of this Court

HDLI and NAHRO therefore respectfully request, through the below named counsel, that this Court grant leave permitting HDLI and NAHRO to file the attached Brief of *Amici Curiae* pursuant to Rule 37.2(b) of the Rules of this Court.

Respectfully submitted,

June 22, 2001

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Washington, D.C. 20001

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INTEREST OF THE AMICI CURIAE[1]

HDLI and NAHRO, the *amici curiae,* believe that ridding public housing developments of illegal drugs and crime is crucial to maintaining the viability of these developments. They also believe that the process and standards under which public housing agencies enforce their leases is critical to the successful management of public housing developments, crime reduction in those developments, and the physical and social well-being of the many law-abiding tenants of public housing. HDLI and NAHRO regard the decision of the court below as imposing unnecessary and improper legal impediments to removing criminal elements from public housing, thus diminishing the security and quality of life for all public housing residents.

SUMMARY OF ARGUMENT

A considerable number of State courts and three federal courts have considered the issues raised by this case, with conflicting results. Guidance from this Court is necessary to assure that the applicable federal law will be properly interpreted by the state and federal courts.

The incidence of crime and illegal drugs in public housing is a matter of great concern to the federal government. This concern is directly reflected in federal policies authorizing the removal from public housing of families whose members engage in drug-related or other serious criminal activity.

Section 6(*l*)(6) of the U.S. Housing Act of 1937 and the federal regulations and public housing lease provisions

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[1] In compliance with Rule 37.6 of this Court, *amici curiae,* HDLI and NAHRO state that the counsel named below, who serves as Executive Director and Counsel to HDLI, authored this brief in full, and that no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. The *amici curiae* are described in the motion accompanying this brief.

implementing it clearly and unambiguously provide authority for the terminations of tenancy in this case, irrespective of whether the tenants knew of the criminal activities that constituted the grounds for termination or had control over the household members or guests engaging in such activities. Because the statute is unambiguous, resort to legislative history on the part of the lower court was improper. If, *arguendo*, the lower court properly considered legislative history, it erred in failing to consider relevant legislation subsequently enacted by Congress.

The court below erred in failing to defer to the interpretation of the statutory language by the Department of Housing and Urban Development (HUD). It also usurped the discretion properly residing with the housing authority under applicable federal law with respect to terminations of public housing tenancy.

Imposing responsibility on the head of household to ensure that the conduct of household members conforms to the requirements of the public housing lease is vital to the successful administration of the federal public housing program and is not unreasonable.

ARGUMENT

I. STATE AND FEDERAL COURTS ARE IN CONFLICT CONCERNING THE ISSUES RAISED BY THIS CASE. GUIDANCE FROM THIS COURT IS NECESSARY TO ASSURE THAT THE APPLICABLE FEDERAL LAW WILL BE PROPERLY INTERPRETED AND APPLIED.

The Oakland Housing Authority brought state court eviction actions against Respondents, Rucker, Lee, and Hill for drug-related criminal activity engaged in by household members outside their public housing units. Similar action was brought against Mr. Walker because of drug-related criminal activity in Mr. Walker's unit by a guest/caregiver.

The respective Respondents alleged in each case that they were unaware of the criminal activity, were thus innocent of wrongdoing, and should not be evicted.

The propriety of Respondents' assertion involves whether or not section 6(*l*)(6) of the United States Housing Act of 1937 (42 U.S.C. §1437d(*l*)(6)) and the regulations of the Department of Housing and Urban Development (HUD) implementing this language permit a public housing authority (PHA) to terminate the public housing tenancy of a so-called "innocent tenant." That is, do the statute and regulations authorize eviction of the entire household based on the criminal misconduct of an individual household member other than the head-of-household or of a guest, where the tenant head-of household asserts that he or she did not participate in the criminal activity and had neither knowledge of it nor the ability to prevent it.

Section 6(*l*)(6) was originally enacted (as section 6(*l*)(5)) in the Anti-Drug Abuse act of 1988. This provision required public housing leases to provide that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy. [emphasis supplied]

Id., §5101, 42 U.S.C. §1437d(*l*)(5). The operative language, the meaning of which is at issue in this case, is underlined.

This paragraph was amended and restated without substantive change to the operative language, by the Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA) (Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990)). The amended language requires public housing agencies to utilize leases that:

> (5) provide that any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. Id. [emphasis supplied]

The contrasting majority and dissenting opinions of the en banc Ninth Circuit in this case exemplify the sharp philosophic division of the courts nationwide concerning the proper interpretation of this statutory language, as applied to "innocent tenant" evictions.

The majority ruled that this language and the relevant HUD regulations[2] do not authorize the eviction of innocent tenants. It held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring but for lack of knowledge or other reason could not realistically exercise control over the conduct of a household member or guest, §1437d(*l*)(6) does not authorize the eviction of such a tenant." 237 F3d. 1113, 1126. The court in essence fashioned a new regulation, which distinguishes between evictions for criminal activity occurring within the public housing unit and those where it occurs elsewhere. In the latter circumstance, the PHA may evict "when it can prove the tenant knew or should have known of the activity. In the former, a rebuttable presumption is created that a tenant controls what occurs in his or her unit, and PHAs may proceed with these evictions without initial proof of knowledge or control. Id. 1126-27

In reaching this result, the majority first determined

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2 HUD's regulations and regulatory preamble unequivocally authorize innocent tenant evictions. Pertinent portions of the regulations and preamble to HUD's Lease and Grievance rule are set forth in the Appendix (App. 1a-5a).

that the operative language (underlined above) in Housing Act §6(*l*)(6) does not itself speak to the question at issue - eviction of the "innocent tenant." This omission, it was said, rendered the language sufficiently ambiguous to permit resort to legislative history in an effort to ascertain congressional intent. Conceding that no such history can be found concerning the original enactment of this language in the 1988 Anti-Drug Abuse Act, the court nonetheless found indication of its meaning in Senate Report No. 101-316, relating to the subsequently enacted Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA). As noted, NAHA reenacted the operative portion of §6(*l*)(6), in a form virtually identical to that found in the 1998 Anti-Drug Abuse Act. The Senate Report contained the following paragraph, cited by the majority as indicative of congressional intent that innocent tenant evictions were not intended by Congress:

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity. Id. 1123

Despite the fact that the report language mentions only guests, and not household members, the majority broadly concluded:

> In these Reports, Congress specifically rejects the notion that the PHAs' discretion is so broad that it extends to the eviction of innocent tenants.... §1437d(*l*)(6) must be read in conjunction with the good cause requirement of §1437d(*l*)(5). Accordingly, we reject HUD's interpretation as contrary to the clearly

expressed intent of Congress. *Chevron* 467 U.S. at 842-43, 104 S.Ct. 2778. Id. 1123

The court also relied upon several additional principles of statutory construction: Statutory language should be interpreted by considering its place in the overall statutory scheme, and statutes should, where possible, be construed in a manner that will harmonize them;[3] statutes should not be interpreted to produce odd or absurd results;[4] and finally statutes should, wherever possible be construed in a manner that will avoid serious doubts about their constitutionality.[5]

---

3 In addition to the grounds for termination of public housing tenancy stated in §6(l)(6), §6(l)(5) also permits termination of tenancy for serious or repeated violations of the lease or "other good cause." In the name of interpreting the provisions in context, the court interpreted the "good cause" requirement as limiting terminations under §6(l)(6) for criminal activity. In fact, these provisions are separate and cumulative of one another. The majority also said that HUD's construction of paragraph 6(l)(6) would allow "irrational evictions, and thus would require PHAs to include an unreasonable term in their lease [in violation of §6(l)(1) prohibiting unreasonable lease terms] of and permit eviction without good cause." 237 F.3d. 1113, 1121

4 The majority hypothesized that, because it authorizes eviction for drug-related criminal activity occurring off the public housing premises, the statutory language, when taken to the extreme, would allow eviction of a family for drug crime committed by a family member 3,000 miles away without the knowledge of the other members of the household. The majority concluded that this "odd and absurd" result could not have been intended by Congress and the statute should be interpreted so as to avoid it. This hypothetical did not, of course, represent the matter before the court, where the drug crime occurred in the unit (one instance), on the premises of the development (two instances), and three blocks away (one instance).

5 The court hinted, but did not hold, that innocent tenant evictions might violate constitutional due process requirements. To avoid this perceived constitutional problem, the court adopted the tenants' suggestion that the term "control" in the statutory language be construed "as a limitation on the

All of these considerations led the court to conclude that "...Congress did not intend §1437d(*l*)(6) to permit the eviction of innocent tenants. Thus, HUD's contrary interpretation must be rejected...." Id. 1127

The four-judge dissent expressed virtually no common ground with the majority, save perhaps in its acknowledgment of the extreme seriousness of drug and crime problems in public housing and in its agreement that the principles of Chevron U.S.A., Inc. v Natural Resources Defense Counsel, 467 U.S. 837 (1984) ought to govern. The dissent points out that, under Chevron, a court may not substitute its interpretation for that of a federal agency charged with implementing a statute where the agency's interpretation is a "permissible" construction of the statute.[6] 237 F.3d 1113, 1128

In addition to observing that the plain language of the statute authorizes "ignorant" tenant evictions, the dissent points to other Housing Act language (42 U.S.C.

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breadth of the provision." 237 F.3d 1113, 1126 In this way, the majority found its way to requiring that the PHA must prove the tenant could realistically have exercised control not only of "another person under the tenant's control" who engages in criminal activity but also of household members and guests who do so. An ordinary textual analysis does not suggest this interpretation.

6 In order for a court to disregard HUD's regulations, therefore, Chevron requires a finding of congressional intent on the precise question at issue that is sufficiently unequivocal as to render HUD's contrary construction of the statute impermissible. The majority's assertion that congressional intent is unequivocal is weakened as it regards evictions based on the misconduct of household members (three of the four plaintiffs in this case) where the legislative history relied upon (Senate Report No. 101-316) mentions only guests and says nothing about evictions based on crime by household members. Moreover, as the dissent points out, a full consideration of statutory context reveals that the Housing Act elsewhere vests in PHAs maximum authority and flexibility in carrying out the housing programs, and the Senate Report itself acknowledges that the Housing Act grants PHAs discretion to determine when evictions are appropriate.

§1437d(c)(4)(A)(iii)) that makes sense only if ignorant tenant evictions were permitted and draws a conclusion directly contrary to that of the majority with respect to the inclusion of an innocent tenant defense in the federal statutes providing for civil forfeiture.[7] The dissent further notes that Congress did not elect to amend §1437d(*l*)(6) in 1996 when it amended this section to extend the authorization to evict from public housing to off-premises drug crime, notwithstanding that it was well-aware of the position of advocacy grounds that innocent tenant evictions ought not to be permitted.[8] It cited, in this regard, the Ninth Circuit's own precedent in United States v. Hunter, 101 F. 3d 82 (9th Cir. 1996): "As a matter of statutory construction, we 'presume' that congress is knowledgeable about existing law pertinent to the legislation it enacts.'". Id. 85

The dissenting opinion also directly refutes the majority's conclusions; 1) that evictions of innocent tenants are "unreasonable" or "absurd" and 2) that construing §6(*l*)(6) to permit such evictions violated the statutory prohibition in §6(*l*)(1) of unreasonable lease terms. While agreeing that the district court had properly defined a reasonable lease term, the

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7 The majority suggested that the enactment of statutory innocent owner defense in another section of the 1988 Anti-Drug Abuse Act (21 U.S.C. § 881(a)), which provides for forfeitures of real property interests including leaseholds, indicated a Congressional intent to provide an innocent tenant defense in §6(l)(6). 237 F.3d 1113, 1121-22 The lack of such language in §6(l)(6) actually argues the contrary, since, as the dissent pointed out, Congress was capable of including such a defense in §6(l) if it had so desired or intended. See Russello v. United States, 464 U.S. 16 (1983).

8 Congress has further amended Section 6 of the Housing Act and enacted other free-standing provisions relating to screening and evictions from public housing in Subtitle F of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105-276, approved October 21, 1998). These amendments, and the fact that they enunciate clear present congressional intent to exclude entire households based on the conduct of individual household members are discussed infra.

dissent disagreed that regulations and lease provisions permitting innocent tenant evictions were unreasonable in the context of the twin congressional objectives of addressing increasing drugs-related crime in public housing and of enabling PHAs to possess a credible deterrent against criminal activity so that tenants would cooperate with PHAs in solving these problems. These objectives, coupled with the fact that such provisions are in regular use among private parties to leases of residential property, attested to the fact that "the congressional imposition of liability without fault on individuals is not per se unreasonable." 237 F.3d 1113, 1137

Finally, the dissent disputed the use by the majority of the doctrine of "constitutional doubt." The majority had expressed doubt about whether innocent tenant evictions might violate due process. In order to assure the statute's constitutionality, the majority construed the word "control" in the statute as a limitation on all evictions for third-party crime. The dissent replied that this misapplied the doctrine of constitutional doubt. Quoting Almendarez-Torres v. United States, 523 U.S. 224 (1998), the dissent pointed out that "[t]he 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." Id. 239 The doctrine is properly applied only where the statute is genuinely susceptible of two constructions and there is a serious likelihood that the statute will be held unconstitutional.[9] A discussion follows in which the dissent notes that housing is not a constitutional or other entitlement and that the rights arising under the Housing Act do not stem from constitutional necessity but rather congressional notions of sound policy. "In this case, Congress has limited the right to reside in public

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9 237 F.3d 1113, 1138 It may be noted that, if the statute is genuinely susceptible of more than one interpretation, majority was bound under Chevron to defer to HUD's interpretation.

housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests." 237 F.3d 1113, 1138 The dissent concluded that no genuine due process issue exists.

The sharp divisions of opinion seen in the respective opinions of the majority and the dissent in this case, reflect the views of other courts that have decided the "innocent/ignorant tenant" issue:

Subsequent to publication of the opinion by the three-judge panel in Rucker, but before publication of the court's *en banc* opinion, the United States District Court, Middle District of Florida, rejected a challenge on constitutional and other grounds to the eviction of several "innocent tenants" in Burton v. Tampa Housing Authority, Case. No. 8:99-cv-1238-T-26E (Unreported). In granting the housing authority's motion for summary judgment, the district court followed the reasoning of the three-judge panel in Rucker and an earlier opinion of the Fifth Circuit Court of Appeals upholding a policy of the El Paso Housing Authority that held tenants responsible for the on-premises criminal activity of guests. Chavez v. Housing Authority of the City of El Paso, 973 F.2d 1245 (5th Cir. 1992). This ruling is presently under review by the Eleventh Circuit Court of Appeals.

The Supreme Courts of Minnesota and Tennessee have considered the innocent tenant issues, reaching contradictory results. Compare Minneapolis Public Housing Authority v. Lor, 591 N..W.2d 700 (Minn. 1999) (upholding eviction of entire family for drive-by shooting on public housing premises in which tenant's son participated, recognizing no requirement for proof of the tenants knowledge or participation, and limiting the scope of judicial review to determination of lease violation) with Memphis Housing Authority v. Thompson, 38 S.W.3d 504 (Tenn. 2001) (disallowing eviction of tenant for drug possession of guest occurring in her public housing unit, finding the lease provision based on federal statute and regulations to be ambiguous and construing it against the

drafter). A petition to this Court for a writ of certiorari seeking review of this decision (Docket No. 00-1861) has been filed by the Memphis Housing Authority.

Predictably, state intermediate appellate courts are in confusion regarding the law applicable to "innocent tenant" evictions. A number of such courts have upheld terminations of tenancy in such cases under various factual circumstances.[10]

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10 E.g., Housing Authority of New Orleans v. Green, 657 So.2d 552 (La. App. 4th Cir. 1995), app. denied, 661 So.2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996) (allowed eviction of tenant for drug-related criminal activity of son based on tenant's contractual obligation under the lease to assure that such activity did not occur); Minneapolis Public Housing Authority v. Holloway, CO-95-391, 1995 Minn. App. LEXIS 1028 (Minn. Ct. App. Aug. 15, 1995) (permitted eviction of tenant for criminal activity by persons allowed in her unit, rejecting argument that eviction was improper where the tenant could not have foreseen the activity or controlled the events leading to the termination of her tenancy); South San Francisco Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 49 Cal. Rptr. 2d 367 (1995) (eviction of entire family for son's drug possession allowed despite lack of parents' knowledge, where lease contractually obligated tenant to assure that drug crime not occur in the unit); Allegheny County Housing Authority v. Liddell, 722 A.2d 750 (Pa. Commw. Ct. 1998) (PHA did not abuse its discretion in evicting innocent/ignorant tenant for drug-related crime of guest outside the unit, and lower court, in refusing to evict, improperly substituted its discretion for that of the PHA); Syracuse Housing Authority. v. Boule, 172 Misc.2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), aff'd, 177 Misc.2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), rev'd, 265 A.D.2d 832, 701 N.Y.S.2d 541 (N.Y.App.Div. 4th Dep't 1999) (eviction of tenant permitted where tenant's babysitter and others had engaged in drug-related criminal activity in tenant's unit while she was at work and presumably unaware of the activity); Memphis Housing Authority v. Thompson, 1999 Tenn. App. LEXIS 506 (Tenn. Ct. of App. July 29, 1999) (allowed eviction for drug possession of guest where tenant had no prior knowledge of the criminal activity, ruling that tenant violated lease when she allowed the perpetrator into her unit and subsequently failed to assure that he did not engage in criminal activity there) rev'd 2001 Tenn. LEXIS 106 (Tenn. Feb. 20, 2001); Willock v. Schenectady Municipal Housing Authority, 706 N.Y.S.2d 503 (N.Y. App. Div. 2000) (where neither the statute nor HUD's regulation sets forth a requirement for knowledge by the tenant, eviction of tenant for drug possession of a guest was proper); Ann Arbor Housing Commission v.

Others have reached contrary results.[11]

Faced with conflicting judicial precedents, local housing agencies are uncertain of the enforceability of federal policy articulated by the Department of Housing and Urban Development authorizing the eviction of so-called innocent tenants. This circumstance increasingly emboldens tenants to refuse to cooperate in the removal and bar of offending

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Wells, 618 N.W.2d 43 (Mich. Ct. App. 2000) (eviction of tenant for drug-related crime of brother was proper regardless of whether tenant had knowledge of the illegal activity) See also, Housing Authority & Urban Redevelopment Agency of Atlantic City v. Spratley, 327 N.J. Super. 246, 743 A.2d 309 (N.J. Super. App. Div. 1999) (federal law preempted New Jersey's anti-eviction law and federally mandated lease provisions holding tenant accountable for acts of household members or guests are not unreasonable and must be enforced); Barajas v. Housing Authority of Harlingen, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (where household member sold drugs outside the unit, eviction of co-tenant was within the discretion of the housing authority).

11 E.g., Housing Authority of Charlotte v. Patterson, 464 S.E.2d 68 (N.C. App. 1995) (refusing to evict tenant for her son's homicide of neighbor where unless personal fault of tenant could be shown, resorting to Committee Report to ascertain Congressional intent after finding § 6(l)(5) of the Housing Act to be ambiguous); Vargas v. Franco, 656 N.Y.S.2d 628 (N.Y. App. Div. 1997) (refusing to evict tenant for repeated acts of graffiti outside the unit by tenant's son because eviction penalty deemed too harsh); Housing Authority of the City of Hoboken v. Alicea, 297 N.J Super. 310 (N.J. Super. Ct. App. Div. 1997) (PHA could evict tenant for drug possession of son in unit only if it could show that the tenant both permitted the offender to stay in the apartment and knew of his illegal activities); Dolson v. Middletown Housing Authority, 672 N.Y.S.2d 665 (N.Y. Sup. Ct. 1998) (tenant was not vicariously liable for conduct of her son) Minneapolis Public Housing Authority v. Lor, 578 N.W.2d 8 (Minn. Ct. App. 1998) (refusing to evict for son's participation in drive-by shooting on equitable grounds where tenant was out of town at the time and did not know of or participate in the criminal act) rev'd 591 N.W.2d 700 (Minn. 1999); Delaware County Housing Authority v. Bishop, 749 A.2d 997 (Pa. Commw. Ct. 2001), cert. denied 121 S.Ct 1644 (2001); Housing Authority of Pittsburgh v. Fields, 2001 Pa.. Commw. LEXIS 182, March 28, 2001).

household members or guests, a course of action that represents the only practicable alternative to evicting the entire household. A decision of this Court upholding the policy of the Department of Housing and Urban Development regarding this issue is important and necessary to the control of crime in public housing developments nationwide.

II. THE INCIDENCE OF CRIME AND ILLEGAL DRUGS IN PUBLIC HOUSING IS A MATTER OF GREAT CONCERN TO THE FEDERAL GOVERNMENT. THIS CONCERN IS DIRECTLY REFLECTED IN FEDERAL POLICIES AUTHORIZING THE REMOVAL FROM PUBLIC HOUSING OF FAMILIES WHOSE MEMBERS ENGAGE IN DRUG-RELATED OR OTHER SERIOUS CRIMINAL ACTIVITY.

The seriousness of drug and crime problems in public housing was acknowledged in both the majority and dissenting opinions of the court below. They reflect the awareness Congress had, in 1988, when those problems were perceived as so serious to warrant passage of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4295, 42 U.S.C. §11901 *et seq.* Since 1988, according to HUD News Release 99-233 and Agency Budget Summaries available from the Office of National Drug Control Policy, Congress has funded and HUD awarded more than $2 billion in grants under the Public and Indian Housing Drug Elimination Program authorized in the Anti-Drug Abuse Act. These grants have been earmarked for activities aimed at achieving a reduction of drug use and other crime in public and assisted housing.

Since 1991, strict federal policies concerning public housing evictions for drug-related and other criminal activity by members of public housing households and their guests have been reflected in HUD's regulations, as promulgated in final rule, published October 11, 1991, entitled "Public Housing Lease and Grievance." 56 FR 51560 *et seq.* Housing Act

paragraph 6(*l*)(6), as enacted in the Cranston-Gonzalez National Affordable Housing Act of 1990 is implemented by regulations at 24 CFR §§ 966.4((f)(12) and 966.4(*l*)(2)(ii). These regulatory provisions closely track the statute and require public housing leases to contain provisions that obligate the tenant contractually to assure that neither the tenant nor any household member, guest or other person under the tenant's control commit crimes. (Appendix, 1a-5a). These policies are confirmed in HUD regulations published May 24, 2001 implementing Subtitle F of the Quality Housing and Work Responsibility Act (Pub. L. 105-276, approved October 21, 1998) and other statutory enactments. 66 FR 28776 *et seq.*

III. THE STATUTE AND REGULATIONS ARE UNAMBIGUOUS. THEY PROVIDE CLEAR AUTHORITY FOR TERMINATION OF TENANCY IRRESPECTIVE OF THE TENANT'S KNOWLEDGE OF, OR PARTICIPATION IN THE CRIMINAL ACTIVITIES OF OTHER HOUSEHOLD MEMBERS OR GUESTS. RESORT TO LEGISLATIVE HISTORY WAS THUS UNNECESSARY AND IMPROPER.

That the drug-related criminal activity in this case constitutes a sufficient basis for eviction, absent questions of the personal involvement or fault of the tenant heads-of-household, is not in dispute. However, the Ninth Circuit found the statute and regulation to be ambiguous as it regards the eviction of so-called innocent tenants.

Amici Curiae urge that the statutory language is not ambiguous. It plainly says that PHAs are required to utilize public housing leases providing that it shall be cause for termination of tenancy if either (1) the tenant, or (2) any household member, (3) or any guest or (4) any other person under the tenant's control, engages in certain types of criminal behavior. The language contains no mention of a requirement of personal fault on the part of the head of household, or of knowledge, or of control over a household member. An

ordinary reading of the statutory text will indicate that the word "control" refers to "another person," not to a household member or guest.

The Ninth Circuit majority asserts that the language of the statute is ambiguous, not because of what it says, but rather because of what it does not say. Applying such a standard subjects virtually any text that does not elaborate what it does not mean, or what it does not say, to a charge of ambiguity. This Court has stated that where the statutory command is straightforward, there is no reason to resort to legislative history. "Where there is no ambiguity in the words, there is no room for construction." United States v. Gonzales, 117 S.Ct. 1032, 1036 (1997). Only an "absurd or glaringly unjust result" ..."would warrant departure from the plain language of the statute." Inter-Modal Rail Employees Ass'n v. Atchison T&SF Ry. Co., 117 S.Ct 1513, 1516 (1997). "We have repeatedly recognized that "[when]...the terms of a statute [are] unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances....In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." United States v. James, 478 U.S. 597, 606 (1986) (internal quotations and citations omitted). By these standards, and seen in the larger context of federal housing policy, Housing Act § 6(*l*)(6) should be given its plain meaning.

IV. IF, *ARGUENDO*, THE COURT BELOW PROPERLY RESORTED TO LEGISLATIVE HISTORY CREATED SUBSEQUENT TO THE ORIGINAL ENACTMENT OF THE LANGUAGE IN QUESTION, IT ERRED IN FAILING TO CONSIDER ALL RELEVANT LEGISLATION SUBSEQUENTLY ENACTED BY CONGRESS.

As noted, the statutory language at issue in this case was first enacted, substantively, in the 1988 Anti-Drug Abuse Act. It was reenacted without substantive change in the 1990

Cranston-Gonzalez National Affordable Housing Act. The report language relied upon by the court below as instructive of congressional intent relates to the 1990 re-enactment of this language.

To the extent that resort to non-contemporaneous materials extrinsic to the statutory language is considered appropriate, *amici curiae* urge that all subsequently enacted legislation relating to control of crime in public housing should be considered. Since 1990, Congress has legislated at least four times with respect to control of illegal drugs and crime in public housing. Its most direct expression of Congressional intent to authorize the exclusion and removal of entire households from public housing because of the criminal activity of individual members of the household is found in the provisions of Subtitle F of the Quality Housing and Work Responsibility Act of 1998, §§ 575-579:[12] (emphasis added)

> § 576(b) requires PHAs to establish standards that prohibit admission to public housing] for "any household with a member" who the PHA determines is illegally using a controlled substance or with respect to whom the PHA has reasonable cause to believe that "such household member" has a pattern of abuse of drugs or alcohol that may interfere with the health,

[12] Also, §9(a)(2) of the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, substituted the word "off" for the word "near" in this paragraph, thus permitting termination of public housing tenancy for drug-related criminal activity occurring off the premises of public housing developments. See also Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 903, authorizing termination of tenancy of public housing tenants fleeing to avoid prosecution for a felony or violating probation or parole; VA, HUD and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, § 428, barring public and assisted housing occupancy by persons convicted of manufacturing methamphetamine in a public housing unit.

> safety or peaceful enjoyment of the premises by other residents.
>
> § 576(c) provides that if a PHA determines "that an applicant or any member of the applicants's household" is or was during a reasonable period preceding the application engaged in [criminal activity], the PHA may deny "such applicant" [*i.e.*, household] admission to the program or the federally assisted housing.
>
> § 577(a) provides: "...a public housing agency...shall establish standards or lease provisions for continued assistance or occupancy...that allow the agency...to terminate the tenancy or assistance for any household with a member - [who is illegally using drugs or whose abuse of drugs or alcohol may constitute a threat to other residents]."

In the face of this legislation, enacted during the pendency of HUD's "One-Strike and You're Out" Initiative, it is impossible to conclude that present federal policy prohibits the eviction of the "innocent tenant."

V. IMPOSING RESPONSIBILITY ON THE HEAD OF HOUSEHOLD TO ENSURE THAT THE CONDUCT OF HOUSEHOLD MEMBERS CONFORMS TO THE REQUIREMENTS OF THE PUBLIC HOUSING LEASE IS ESSENTIAL TO THE SUCCESSFUL ADMINISTRATION OF THE FEDERAL PUBLIC HOUSING PROGRAM AND IS NOT UNREASONABLE.

Imposing upon public housing agencies a requirement that they prove knowledge on the part of tenants concerning the activities of other household members is impractical. As pointed out in HUD's preamble to the 1991 Lease and Grievance rule, in practice it may be extremely difficult or

impossible for a public housing agency to show that the tenant knew or could have foreseen a criminal act or failed to take all reasonable measures to prevent it. 56 FR 51567, App. 4a Agencies may have no capability to rebut self-serving testimony on the part of household members, whatever the truth may be. Public housing agencies (and other residents) should not be required by the courts to await victimization by a reoccurrence of criminal behavior before being able to evict. As both HUD and local officials have observed, the only practicable policy for deterring criminal misconduct of members of public housing households must be to hold the only persons in a position to know all the facts responsible for the household's behavior.

VI. THE COURT BELOW ERRED IN FAILING TO DEFER TO THE DEFINITIVE INTERPRETATION OF THE STATUTORY LANGUAGE BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

The meaning ascribed by the lower court to Housing Act paragraph 6(*l*)(6) directly contradicts conclusions reached concerning this language by HUD. The preamble to HUD's 1991 Lease and Grievance final rule, promulgating the applicable regulations, makes it clear that, with respect to the responsibility of the head of household for the conduct of other members of the household, HUD regards the statutory language as authorizing a direct contractual obligation. The tenant's liability is not vicarious. Section 3.3 of the rule preamble makes clear that the head of household has an affirmative obligation to ensure that members of the household do not engage in prohibited criminal behaviors. (App. 1a-4a). The preamble addressed public comments urging that the rule be changed so that eviction of a public housing tenant for misconduct on the part of other household members be predicated on actual knowledge or ability to control. HUD rejected these suggestions. 56 FR 51566

This Court has repeatedly held that, where an agency charged with enforcing a statute has rendered an interpretation that is a permissible construction of the statute, a court may not substitute its own interpretation for that of the agency. Chevron, supra.

VII. THE COURT BELOW USURPED THE DISCRETION PROPERLY RESIDING WITH THE HOUSING AUTHORITY UNDER APPLICABLE FEDERAL LAW.

The applicable provision of the U.S. Housing Act and HUD's regulations do not require a PHA to evict. They state only that public housing leases must provide that certain behaviors on the part of a tenant, any member of tenant's household, a guest or other person under the tenant's control *shall be cause for* eviction. Assuming that a lease violation is established, whether or not action will be taken to terminate tenancy and subsequently to evict rests within the discretion of the PHA. HUD's Public Housing Lease and Grievance regulations at 24 CFR § 966.4(*l*)(5) explicitly recognize this.

The discretion to which these regulations refer resides with the PHA not the reviewing court. See Minneapolis Public Housing Authority v. Lor, 591 N.W.2d 700 (Minn. 1999) The discretionary decision of the PHA should thus not be disturbed unless arbitrary, capricious, unsupported by substantial evidence, or abusive to such an extent as to amount to an error of law. Clark v. Alexander, 85 F.3d 146 (4th Cir. 1996)

The holding of the majority in the court below and those of other courts refusing to evict the so-called "innocent tenant" seem implicitly based in conceptions of equity and the avoidance of hardship to the tenant. Judicial focus in such cases only upon the perceived hardship to individual defendants represents an incomplete conception of equity, because it ignores the disastrous effect that drug-related and serious violent criminal behavior has upon other public housing residents.

Excessive focus on avoiding hardship to the defendants in these cases also ignores the reality that the retention of a family in public housing whose members commit crimes has the likely effect of excluding an equally needy family on the waiting list whose members are not criminals. As the dissent in the court below acknowledged, unlike federal benefit programs such as Food Stamps, federal housing benefits have never been an "entitlement" under which all income-eligible persons have a right to housing assistance. To the contrary, it has been estimated that, nationwide, the assistance available under the federal housing programs is sufficient to serve only *25 percent* of the persons who are actually eligible for such assistance.[13] The scarce resource that is public housing ought to be reserved for families whose members do not engage in drug crimes or prey upon their neighbors. Ultimately, someone must be responsible for the criminal behavior of household members. That someone must be the person responsible for introducing those engaging in the criminal misconduct to the public housing community.

CONCLUSION

For the foregoing reasons, *amici curiae* HDLI and NAHRO respectfully urge the Court to issue a writ of certiorari to the United States Ninth Circuit Court of Appeals in this cause.

Respectfully submitted,

June 22, 2001

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[13] Kingsley, *Federal Housing Assistance and Welfare Reform: Uncharted Territory*, The Urban Institute, New Federalism - Issues and Options for States, Series A, No. A-19 (Dec. 1997)

APPENDIX

APPENDIX

Excerpt, HUD 1991 Public Housing Lease and Grievance Rule Preamble (56 FR 51566-67)

3.3 *Eviction For Criminal Activity*

3.3.1 Crime By Household Member

Federal law provides that certain categories of criminal activity by a public housing household member are grounds for eviction. A PHA must: "utilize leases which-... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, *engaged in by ... any member of the tenant's household ...* shall be cause for termination of tenancy ..." (U.S.H. Act, sec. 6(1)(5). 42 U.S.C. 1437d(1)(5)) {emphasis supplied}.

The U.S.H. Act statutory prohibition of criminal activity by a public housing household member was originally enacted in the Anti-Drug Abuse Act of 1988 (section 5101. Pub. L. 100-690. November 18, 1988), and was retained in the 1990 NAHA amendments which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S.H. Act). The proposed and final rule provide that the tenant must assure that members of the household (or guests, or other persons under the tenant's control) do not engage in proscribed criminal activity (§ 968.4(f)(12)(i)).

Comment by legal aid and by tenant organizations asserts that the tenant should not be required to "assure" the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by

members of the household. Comment proposes various possible standards to determine whether the tenant can be evicted for criminal behavior by household members. Comment alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything "reasonable" to control the criminal activity. Comment states that under the Constitution a tenant can only be held responsible for activity of a household member within the tenant's control.

PHA comment states that the PHA must be given discretion to evict an entire family for actions of a family member if eviction is in the best interest of other residents. If a PHA lacks clear authority to evict, the PHA may not be able to convince the family to oust a person who engages in criminal activity from the unit.

As in conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease, including obligations concerning the conduct of household members affecting the unit, the management of the housing or the welfare of other residents. By signing the lease, a tenant agrees to comply with leasehold requirements pertaining to the behavior of family members. The ability of a PHA or other landlord to enforce covenants relating to acts of unit residents (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal, or other harmful or disruptive behavior, by

unit occupants, the landlord can evict - removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the continued presence of the tenant and household may result in harm to the housing or other residents, and the spread of such behavior.

The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents, warranting special mention in the law. (U.S.H. Act section 6(1)(5). 42 U.S.C. 1437d(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction). The legislative determination by the Congress rests on a reasonable judgement that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general, and will support the effective management of the housing. Since this judgement is reasonable, and promotes a legitimate public purpose, the legislation is Constitutional under the normal equal protection standard.

There is no reason of Constitutional necessity or public policy for HUD to impose - as proposed by comment - any additional restriction on when the tenancy may be terminated for criminal activity by a household member.

First, as we have already remarked, contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be

excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Second, if household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant's right to continued occupancy by the family. The standards proposed by some of the public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Third, in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent, crime by a household member. In practice, the tenant may have encouraged or profited from the criminal activity or may have ignored or turned a blind eye. The statute and regulations are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member. (If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.)

Finally, a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.

24 CFR §§ 966.4((f)(12) and 966.4(*l*)(2)(ii)

(f) The Lease shall provide that the tenant shall be obligated...
(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
(A) Any criminal activity that threatens the health, safety or right of peaceful enjoyment of the PHAs public housing premises by other residents or employees of the PHA, or (B) any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(2) *Grounds for termination...*
(ii) Either of the following types of criminal activity by the tenant, any member of the tenant's household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents...."
(B) [Drug-related criminal activity]"

24 CFR § 966.4(*l*)(5)

Eviction for criminal activity - (i) PHA discretion to consider circumstances. In deciding whether to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit...."

Supreme Court, U.S.
FILED
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(19) (18)

Nos. 00-1770 & 00-1781

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: MAY 24, 2001
CERTIORARI GRANTED: SEPTEMBER 25, 2001

12 PM

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NOTICE

The following items appear on the following pages in the printed appendix to the petition for a writ of certiorari in No. 00-1770:

Court of appeals' opinion (Jan. 24, 2001)	1a
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Court of appeals' opinion (Feb. 14, 2000)	70a
District court memorandum, order and preliminary injunction (June 19, 1998)	138a

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 98-CV-781

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; AND BARBARA HILL, PLAINTIFFS

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS

Filed: Feb. 27, 1998

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/27/98	1	COMPLAINT: No Summons(es) issued; Fee status ifpp entered on 2/27/98 [3:98-cv-00781] (mh)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/4/98	4	FIRST AMENDED COMPLAINT [1-1] by Plaintiff; adding plaintiffs Herman Walker, Willie Lee, Barbara Hill, and defendants Oakland Housing Auth, HUD [3:98-cv-00871] (mcl) [Entry date 03/05/98]
		* * * * *
4/3/98	15	DECLARATION by Willie Lee on behalf of Plaintiffs re motion for preliminary injunction [14-1] [3:98-cv-00781] (mcl) [Entry date 04/06/98]
4/3/98	16	DECLARATION by Barbara Hill on behalf of Plaintiffs re motion for preliminary injunction [14-1] [3:98-cv-00781]
4/3/98	17	DECLARATION by Pearlie Rucker on behalf of Plaintiffs re motion for preliminary injunction [14-1] [3:98-cv-00781]

DATE	DOCKET NUMBER	PROCEEDINGS
4/3/98	18	DECLARATION by Herman Walker on behalf of Plaintiffs re motion for preliminary injunction [14-1] [3:98-cv-00781] (mcl) [Entry date 04/06/98]
		* * * * *
4/17/98	29	DECLARATION by Ron Smith on behalf of defendant Harold Davis, defendant Oakland Housing Auth in OPPOSITION to plaintiffs' motion for preliminary injunction [14-1] [3:98-cv-00781] (mcl) [Entry date 04/02/98]
		* * * * *
6/19/98	53	MEMORANDUM, ORDER AND PRELIMINARY INJUNCTION: by Judge Charles R. Breyer granting in part and denying in part defendant Oakland Housing Authority's motion to dismiss for failure to state a claim [31-1] WITH 30 DAYS' LEAVE TO AMEND, granting in part and denying in part defendant

DATE	DOCKET NUMBER	PROCEEDINGS
		Housing and Urban Development's motion to dismiss case [22-1] that defendant Oakland Housing Authority, its officers, agents, servants . . . are preliminarily enjoined, until further order of this Court, from terminating the leases of tenants for drug-related criminal activity that does not occur within the tenant's apartment until . . . that defendant OHA, its officers, agents, servants . . . are preliminarily enjoined, until further order of this Court, from prosecuting the Oakland -Piedmont-Emeryville Judicial District, Alameda County eviction proceedings . . . (see document) (Date Entered: 6/24/98) (cc: all counsel [3:98-cv-00781] (mcl) [Entry date 06/24/98]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16322 AND 98-16542

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE; AND BARBARA HILL, PLAINTIFFS-APPELLEES

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANTS-APPELLANTS

Filed: July 20, 1998

DOCKET ENTRIES

DATE	PROCEEDINGS
7/20/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL [98-16322]. * * *
	* * * * *
8/13/98	Filed original and 15 copies Appellant U.S. Dept. of HUD opening brief * * *.
	* * * * *
8/25/98	DOCKETED CASE AND ENTERED APPEARANCE of counsel [98-16542].

DATE	PROCEEDINGS
8/27/98	Filed order * * * These two appeals are related appeals from the DC's preliminary inj order. Ninth Cir R 3-3 applies to these appeals. The court sua sponte consolidates these appeals. * * *.
9/15/98	Filed original and 15 copies Appellant Harold Davis & Oakland Housing * * *.
	* * * * *
10/6/98	Received Amicus Center for The Community Interest brief * * *
	* * * * *
10/28/98	Filed original and 15 copies appellees' 43 pages brief * * *
	* * * * *
12/10/98	Filed original and 15 copies Harold Davis' & Oakland Housing reply brief * * *
12/15/98	Filed original and 15 copies U.S. Dept. of HUD reply brief, * * *
	* * * * *
2/17/99	Filed original and 15 copies Appellees' supplemental brief in response to amicus brief * * *

DATE	PROCEEDINGS
3/12/99	ARGUED AND SUBMITTED * * *
4/2/99	Filed order (Joseph T. Sneed, Diarmuid F. O'Scannlain, William A. FLETCHER): The parties are requested to file within 14 days of this order briefs of not more than 3,500 words each discussing their respective positions on the relevance of 21 USC 881(a)(7), as well as the amendments made thereto by the Anti-Drug Act of 1988, to the interpretation of 45 USC 1437d(1)(5). Specifically, is the "knowledge or consent of that owner" provision in section 881(a)(7), relating to forfeitures, incorporated into section 1437d(1)(d), relating to leaseholds? * * *
4/16/99	Filed original and 15 copies Appellant U.S. Dept. of HUD's supplemental brief of 7 pages * * *
4/16/99	Filed original and 15 copies Appellants Harold Davis & Oakland Housing in 98-16542 supplemental brief of 7 pages * * *
4/16/99	Filed original and 15 copies Appellees' in 98-16322 supplemental brief of 17 pages * * *
2/14/00	FILED OPINION: The order granting the preliminary injunction is REVERSED, and the preliminary injunction is VACATED. * * *

DATE	PROCEEDINGS
	* * * * *
8/18/00	Filed order FOR PUBLICATION (Procter R. HUG): Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Cir.R. 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the 9th Cir., except to the extent adopted by the en banc court. * * *
	* * * * *
9/15/00	Filed original and 20 copies Oakland Housing supplemental brief * * *
9/18/	Filed original and 15 copies Appellees Pearlie Rucker Herman Walker Willie Lee, Barbara Hill supplemental brief * * *
	* * * * *
9/19/00	ARGUED AND SUBMITTED TO Joseph T. SNEED, Mary M. SCHROEDER, Harry PREGERSON, Stephen R. REINHARDT, Ferdinand F. FERNANDEZ, Thomas G. NELSON, Michael D. HAWKINS, Barry G. SILVERMAN, M. M. MCKEOWN, Ronald M. GOULD, Richard A. PAEZ * * *

DATE	PROCEEDINGS
1/24/01	FILED OPINION: AFFIRMED * * *
	* * * * *

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781 CRB

PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE, AND BARBARA HILL, PLAINTIFFS

v.

HAROLD DAVIS, OAKLAND HOUSING AUTHORITY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DOES I-XXX, DEFENDANTS

[Filed: Mar. 4, 1998]

FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF

JURISDICTION

PLAINTIFFS PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE and BARBARA HILL complain against HAROLD DAVIS, OAKLAND HOUSING AUTHORITY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND DOES I-XXX, and allege:

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. 1331 (federal question involving interpretation of federal statute) and 28 U.S.C. 1343 (deprivation of civil rights)

INTRADISTRICT ASSIGNMENT

This matter is properly assigned to the Northern District of California, Oakland Division, because the events took place in Oakland, Alameda County, California, within the Oakland Division of the Northern District. (L-R 3-2 (d).)

PARTIES

1. PLAINTIFF PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE AND BARBARA HILL are citizens of the United States and reside in the State of California, City of Oakland, Alameda County.

2. DEFENDANT HAROLD DAVIS is, and at all pertinent times was, the chief of the Oakland Housing Authority. He is sued in his official capacity. DEFENDANT OAKLAND HOUSING AUTHORITY is the lessor of the homes in which the plaintiffs reside in the City of Oakland. They administer these homes through a contract with the DEFENDANT UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

3. The identities of DEFENDANTS DOES 1-50 are unknown to PLAINTIFFS, who request leave to amend this complaint when that information is obtained.

4. PLAINTIFFS are unaware of the identities and capacities of DOES 1-50 at this time, and request leave to amend this complaint when this information is ascertained.

SUMMARY OF FACTS

PLAINTIFF PEARLIE RUCKER

5. PLAINTIFF PEARLIE RUCKER resides at 2005 E. 21st Street, Apt. 102, Oakland, California (hereinafter, the Rucker Premises) under a written lease with the lessor DEFENDANT OAKLAND HOUSING AUTHORITY, headed by DEFENDANT HAROLD DAVIS. PLAINTIFF RUCKER is 63 years old, with no history of criminal violations or drug use, and has resided in the premises since 1985. Residing at the Rucker Premises is her daughter Gelinda Rucker and Gelinda's two daughters and one granddaughter. Gelinda receives Supplemental Security Income benefits for a mental disability she has had since birth. She is incapable of adequately caring for herself or for her children. PLAINTIFF RUCKER is the primary care giver for the entire family.

6. PLAINTIFF RUCKER's adult son, Michael Rucker, does not reside at the Rucker Premises, and has not resided there since the early 1980s.

7. On December 31, 1997, DEFENDANT OAKLAND HOUSING AUTHORITY filed a complaint alleging unlawful detainer of the Rucker Premises by PLAINTIFF RUCKER, in the Municipal Court for the State of California, Alameda County, Oakland-Piedmont-Emeryville Judicial District, *Oakland Housing Authority v. Rucker*, Case #012528 (hereafter, the Rucker complaint). The Rucker complaint sought, with other relief, termination and forfeiture of PLAINTIFF RUCKER's lease, and her eviction. The primary basis of this suit is that the PLAINTIFF violated the assurance that no family members, guests, or other persons under her control

would engage in drug-related criminal activity on or near the premises.

8. Along with other allegations, the complaint alleges in substance:

> On March 9, 1997, a Housing Authority officer on patrol in the 2200 block of E. 19th Street (note: approximately three blocks from the Rucker Premises) observed Gelinda drinking an alcoholic beverage in public. When the officer contacted Gelinda, she attempted to conceal the alcohol. Gelinda appeared to be under the influence and was arrested for being drunk in public. A search of Gelinda revealed one rock of suspected cocaine and a crack cocaine pipe. Gelinda gave Rucker's address as her residence.
>
> On September 19, 1997, Oakland police officers on patrol in the 1400 block of 23rd Avenue, Oakland (note: approximately eight blocks from the Rucker premises) saw Michael loitering at a bus stop with a second man. Michael was contacted and subsequently arrested for a warrant. When they searched Michael, the officers found a piece of rock cocaine. Michael gave the Premises as his residence.

9. This DEFENDANT and DEFENDANT DAVIS dismissed the complaint on February 17, 1998. However, these DEFENDANTS have indicated that they construe the quoted lease provision to permit eviction of PLAINTIFF RUCKER irrespective of Mrs. Rucker's personal involvement in, knowledge of, or actual ability to prevent drug-related criminal activity. PLAINTIFF RUCKER has no control over the acts of Michael

Rucker, and is limited in her ability to control the acts of Gelinda Rucker, due to Gelinda's mental disability.

10. For the past seven years, Pearlie Rucker has searched the room of Gelinda Rucker looking for evidence of alcohol and drug use. She has never found any drugs or drug paraphernalia. Pearlie Rucker has never seen Gelinda physically manifest any sign of drug use. She has warned Gelinda and others that any drug use or criminal activity on the premises can result in eviction. See the Declaration of Pearlie Rucker.

PLAINTIFF HERMAN WALKER

11. PLAINTIFF HERMAN WALKER is 75 years old and disabled. The left side of his body, particularly his left hand, is stiff and semi-paralyzed. He is hard of hearing, has problems walking, usually needs a cane, and is periodically put on oxygen due to shortness of breath. He is no longer capable of living independently and requires an in-home health care taker.

12. PLAINTIFF WALKER resides at 1621 Harrison Street #1309, Oakland, California, and has lived at his premises for 8 years. He lives in the "Senior Housing" units of the Oakland Housing Authority. The unlawful detainer action filed against him by the Oakland Housing Authority contains no allegations that he personally engaged in drug-related criminal activity or that he knew of such activity.

13. In later 1977, the DEFENDANT OAKLAND HOUSING AUTHORITY filed a complaint alleging unlawful detainer of the Walker Premises by PLAINTIFF WALKER, in the Municipal Court for the State of California, Alameda County, Oakland-Piedmont-Emeryville Judicial District, *Oakland Housing Authority v.*

[*Walker*], Case #011040 (hereafter, the Walker complaint). The Walker complaint sought, with other relief, termination and forfeiture of PLAINTIFF RUCKER's lease, and his eviction. The primary basis of this suit is that the PLAINTIFF violated the assurance that no family members, guests, or other persons under his control would engage in drug-related criminal activity on or near the premises.

14. Along with other allegations, the unlawful detainer complaint alleges:

> On August 7, 1997, Oakland Housing Authority officers conducting a security check at your complex, which is a senior citizen building, contacted Kelly Shine. Shine, who was not a senior citizen and very fidgety showed signs of being a narcotics user. Officers conducted [*sic*] Shine and a check was conducted. Officers discovered that Shine is on probation with a search clause for narcotics. Officers invoked the search privilege recovering one rock of cocaine and a cocaine pipe. Shine was arrested for possession of narcotics and paraphernalia. Shine told officers she was at your unit with a friend who lived with you. You are the only resident listed on the lease. Officers went to your unit and contacted you. You gave officers permission to search your unit, and once inside they contacted Shine's minor child, Shirley Hardaway, who was wearing a thin nightgown and appeared to be residing in your unit, Marguerite Wise and Eleanor Randle, who has had several narcotics arrests at your complex.
>
> As officers searched your unit, they recovered a cardboard box inside your bedroom containing a plate with suspected rock cocaine chips and four

metal crack cocaine pipes. Randle, who had a cocaine pipe pinned inside her jacket, was arrested for possession of narcotics paraphernalia. In addition, officers observed a large amount of women's clothing and personal items throughout your unit. You denied that anyone was residing with you. A lease violation was drafted.

A week later, August 12, 1997, OHA officers and your housing manager returned to your unit to conduct a follow-up check. During the August 7 contact with you, officers had observed a sign posted on your front door stating "oxygen no smoking". However, your guests were smoking inside your unit. During that contact officers also observed an oxygen machine and several oxygen bottles. As officers and your manager entered your unit with your permission, they again contacted Hardaway in your bedroom wearing a night gown and robe. You again denied that Hardaway resided in your unit. Officers found a rock cocaine pipe inside a bag of hair rollers. As officers informed you of the paraphernalia you stated, you could not control what people brought into your unit. A lease violation was drafted.

On October 11, 1997, Oakland Housing authority officers conducting a security check inside your complex, contacted Eleanor Randle in the lobby area. Randle told offices she had just left your unit and her friend Shirley Hardaway was still inside your unit. Officers were aware of Randle's narcotics activity and prior arrest at your unit. Officers contacted you in your unit and you consented to a search. Once inside, officers contacted Shirley Hardaway sitting on a sofa in your living room.

Hardaway was asked to sit in another area as officers conducted their search. In the creases of your sofa where Hardaway had been sitting officers recovered a glass concaine pipe. Hardaway admitted to using rock cocaine, but denied that the pipe belonged to her. Hardaway was cited for possession of narcotics paraphernalia.

15. PLAINTIFF WALKER fired his in-home caretaker Eleanor Randle shortly after he learned that she had been accused of drug activity in his apartment. See the Declaration of Herman Walker. DEFENDANT OAKLAND HOUSING AUTHORITY's eviction suit against PLAINTIFF WALKER is awaiting trial.

PLAINTIFF WILLIE LEE

16. Willie Lee is 71 years old and has been an Oakland Housing Authority resident for 25 years. There is no allegation by Oakland Housing Authority that she participated in any illegal drug activity or knew of any illegal drug activity.

17. In early 1998, the DEFENDANT OAKLAND HOUSING AUTHORITY filed a complaint alleging unlawful detainer of the Lee Premises by PLAINTIFF LEE, in the Municipal Court for the State of California, Alameda County, Oakland-Piedmont-Emeryville Judicial District, *Oakland Housing Authority v. Lee*, Case #013197 (hereafter, the Lee complaint). The Lee complaint sought, with other relief, termination and forfeiture of PLAINTIFF LEE's lease, and her eviction. The primary basis of this suit is that the PLAINTIFF violated the assurance that no family members, guests, or other persons under her control would engage in drug-related criminal activity on or near the premises.

18. Along with other allegations, the complaint alleges:

> On November 6, 1997, Oakland Housing Authority officers responding to complaints of individuals using narcotics and loitering in the parking lot area of the complex, contacted your grandson Robert Lee, who is listed on your lease as a resident. As officers approached, Lee discarded a marijuana cigarette. He was informed of the complaint and admitted to smoking marijuana. A search of Lee's left front jacket revealed a ziplock baggie containing marijuana. Lee was cited for possession of marijuana.

19. The complaint did not allege that PLAINTIFF WILLIE LEE was personally guilty of, or had any prior knowledge of the illegal drug activity alleged in the complaint as the basis for the eviction.

20. PLAINTIFF LEE has warned her household that any drug use or criminal activity on the premises can result in eviction. See the Declaration of Willie Lee. DEFENDANT OAKLAND HOUSING AUTHORITY's eviction suit against PLAINTIFF LEE is awaiting trial.

PLAINTIFF BARBARA HILL

21. PLAINTIFF BARBARA HILL is 63 years old and has lived at her premises for approximately 30 years. There is no allegation by Oakland Housing Authority that she participated in any illegal drug activity or knew of any illegal drug activity.

22. In early 1998, the DEFENDANT OAKLAND HOUSING AUTHORITY filed a complaint alleging unlawful detainer of the Hill Premises by PLAINTIFF HILL,

in the Municipal Court for the State of California, Alameda County, Oakland-Piedmont-Emeryville Judicial District, *Oakland Housing Authority v. Hill*, Case #013198 (hereafter, the Hill complaint). The Hill complaint sought, with other relief, termination and forfeiture of PLAINTIFF HILL's lease, and her eviction. The primary basis of this suit is that the PLAINTIFF violated the assurance that no family members, guests, or other persons under her control would engage in drug-related criminal activity on or near the premises.

23. Along with other allegations, the complaint alleges:

> On November 6, 1997, Oakland Housing Authority officers responding to complaints of individuals using narcotics and loitering in the parking lot area of the complex, contacted your grandson Donte McPherson, who is listed on your lease as a resident. As officers approached, one of the individuals with your grandson discarded a suspected marijuana cigarette. McPherson was informed of the complaint and admitted to smoking marijuana. A lease violation was submitted.

24. PLAINTIFF HILL has warned her household that any drug use or criminal activity on the premises can result in eviction. See the Declaration of Barbara Hill. DEFENDANT OAKLAND HOUSING AUTHORITY's eviction suit against PLAINTIFF HILL is awaiting trial.

FACTS COMMON TO ALL PLAINTIFFS

25. All of the PLAINTIFFS have written leases with the DEFENDANT OAKLAND HOUSING AUTHORITY. Each of the PLAINTIFFS has been sued by this DEFENDANT based on the allegation that drug-related

criminal activity has been committed by one of their family or household members on or near the premises.

26. None of these unlawful detainer actions allege that the PLAINTIFFS had any prior knowledge of the alleged drug-related criminal activity or that the PLAINTIFFS personally engaged in drug-related criminal activity.

27. The PLAINTIFFS did not engage in such activity, nor did they have any knowledge of it occurring in the home or on the premises, nor did they permit its occurrence. Each of them denied participation or knowledge of such activity in their answers to the unlawful detainer complaints and in the Declarations submitted in this action.

28. Each of the plaintiffs also informed all of their household members that drug-related criminal activity is not permitted in their home or on the premises. Herman Walker, who lives alone, informed his family members, his caretakers, and his guests.

29. Each of the unlawful detainer complaints alleges that one of the Plaintiffs violated the following portions of the lease agreement:

> Paragraph 9: m. To assure that tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (i) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other public housing residents, or threatens the health and safety of the housing authority employees . . .

> (ii) Any drug-related criminal activity on or near the premises . . .

30. These lease terms were mandated by the DEFENDANT UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, which issued 24 C.F.R. 966.4(f)(12), which mandates that all public housing authority leases contain a clause stating that the leaseholders "assure" that the "tenant, members of the tenant's household, guests, or other persons under the tenant's control" will not engage in "drug-related criminal activity on or near the premises," and that any violation of this assurance will be the basis for violation.

FIRST CAUSE OF ACTION
(42 U.S.C. 1983)

31. PLAINTIFFS incorporate by reference the allegations in Paragraphs 1-30, above.

32. By their acts and omissions, working in concert, DEFENDANTS have acted under color of state law in violating and threatening to further violate PLAINTIFFS' rights under the United States Constitution, as well as the provisions of 42 U.S.C. 1437, *et seq.* Accordingly, PLAINTIFF RUCKER seeks declaratory relief as prayed for below, and PLAINTIFFS WALKER, HILL and LEE seek injunctive relief and declaratory relief as prayed for below.

SECOND CAUSE OF ACTION
(5 U.S.C. 701, *et seq.*)

33. PLAINTIFFS incorporate by reference the allegations in Paragraphs 1-32, above.

34. DEFENDANT UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, has violated

the Administrative Procedure Act (5 U.S.C. 701-706) by acts or omissions that are inconsistent with the applicable statutory and regulatory provisions. Such acts include the issuance of 24 C.F.R. 966.4(f)(12). Accordingly, PLAINTIFF RUCKER seeks declaratory relief as prayed for below, and PLAINTIFFS WALKER, HILL and LEE injunctive relief and declaratory relief as prayed for below.

THIRD CAUSE OF ACTION
(42 U.S.C. 2101, *et seq.*)

35. PLAINTIFFS incorporate by reference the allegations in Paragraphs 1-34, above.

36. The Americans With Disabilities Act (42 U.S.C. Chapter 126) protects disabled persons from discrimination in public accommodations. PLAINTIFF HERMAN WALKER and PLAINTIFF PEARLIE RUCKER's daughter Gelinda are both "disabled" as defined in 42 U.S.C. 12102(2).

37. 42 U.S.C. 12312 provides that "no qualified individual with a disability shall by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

38. Discrimination includes: "Failure to make *reasonable accommodations* in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities." 42 U.S.C. § 12182(b)(2)(A)(ii). These obligations are specifically applied by regulation to public housing

agencies such as the Oakland Housing Authority. See, 24 C.F.R. Subtitle A Part 9.

39. Discrimination also includes: ". . . to deny goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual because of the known disability of an individual with whom the individual is known to have a relationship or association." 42 U.S.C. 12182(b)(1)(E).

40. This statutory scheme requires DEFENDANTS DAVIS and OAKLAND HOUSING AUTHORITY to make the reasonable accommodation of exempting PLAINTIFF WALKER and PLAINTIFF RUCKER from Lease Paragraph 9. Evicting PLAINTIFF WALKER and PLAINTIFF RUCKER for failure to comply with the Lease Paragraph 9—where the physically cannot comply due to his physical disabilities, and she is a homemaker raising her mentally disabled daughter's children but unable to control the daughter's actions when outside the premises—constitutes deprivation of housing based on disability and discrimination in violation of the ADA.

41. This statutory scheme also requires that DEFENDANT UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT make reasonable accommodations in the regulatory scheme to accommodate these PLAINTIFFS. PLAINTIFF RUCKER seeks declaratory relief and PLAINTIFF WALKER seeks injunctive and declaratory relief as set forth below.

FOURTH CAUSE OF ACTION
(Illegal contract)

42. PLAINTIFFS incorporate by reference the allegations in Paragraph 1-41, above.

43. The leases provided to PLAINTIFFS by the DEFENDANT DAVIS and OAKLAND HOUSING AUTHORITY constitute a contract of adhesion, and contains unconscionable contractual terms. Hence, these leases are illegal and unenforceable.

PRAYER

PLAINTIFFS seek the following injunctive relief from the court:

1. Preliminary injunctive relief ordering the Defendant Davis and Oakland Housing Authority to cease and desist, now and in the future, from all attempts to conduct evictions without good cause, founded on allegations and proof of such good cause, and of the tenant's personal participation in, prior knowledge of, and actual ability to prevent drug-related or other criminal activity;

2. Preliminary injunctive relief requiring the Oakland Housing Authority to exempt Herman Walker and Pearlie Rucker from Lease Paragraph 9, pursuant to the mandate of the Americans With Disabilities Act (42 U.S.C. Section 12312, et seq.) to make "reasonable accommodations" to people with disabilities.

3. Preliminary injunctive relief halting the state court eviction cases in *Oakland Housing Authority v. Walker*, action 011040, *Oakland Housing Authority v. Hill*, action 013198; and *Oakland Housing Authority v. Lee*, action 013197; all in the Oakland-Piedmont-Emery-

ville Judicial District, Alameda County, State California; until the issues in this suit are resolved.

4. Preliminary injunctive relief staying the enforcement of 24 C.F.R. 966.4(f)(12) on statutory and constitutional grounds; this regulation mandates that all OHA leases contain a clause stating that the leaseholders "assure" that the "tenant, member of the tenant's household, guests, or other persons under the tenant's control" will not engage in "drug-related criminal activity on or near the premises", and that any violation of this assurance will be the basis for eviction.

5. Preliminary injunctive relief staying enforcement of any provision in HUD and OHA leases and contracts that permits evictions based on drug-related or other criminal activity to be conducted without good cause, that is founded on allegations and proof of such good cause, and on the tenant's personal participation in, prior knowledge of, and actual ability to prevent drug-related or other criminal activity;

6. A declaration that 24 C.F.R. 966.4(f)(12) is both illegal and unconstitutional;

7. A declaration that DEFENDANTS DAVIS and the OAKLAND HOUSING AUTHORITY must cease and desist, now and in the future, from all attempts to conduct evictions based on drug-related or other criminal activity without good cause, founded on allegations and proof of such good cause, that a tenant personally participated in, had prior knowledge of, and the actual ability to prevent criminal activity on the premises.

8. A declaration that the acts and omissions of DEFENDANTS constitutes violations of the United States Constitution and the provisions of 42 U.S.C. 1437, et seq.

9. Attorneys' fees pursuant to 42 U.S.C. 1988, 42 U.S.C. 12101 *et seq.*, and California Civil Code 1717, and

10. Costs of this action;

11. Such other relief as the Court deems just and equitable.

Dated: March 3, 1998

/s/ WILLIAM M. SIMPICH
WILLIAM M. SIMPICH
Attorney for PLAINTIFF

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781

PEARLIE RUCKER, ET AL., PLAINTIFFS

v.

HAROLD DAVIS, ET AL., DEFENDANTS

[Filed Apr. 17, 1998]

Date: May 8, 1998
Time: 10:00 a.m.
Ctrm: 8

DEFENDANTS HAROLD DAVIS AND OAKLAND HOUSING AUTHORITY'S REQUEST FOR JUDICIAL NOTICE

Defendants HAROLD DAVIS and Oakland Housing Authority ("OHA"), by and through their attorneys, hereby request the Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the following facts:

1. Plaintiffs' counsel in the instant case, Mr. John Murcko, also represented the plaintiffs in a lawsuit against the OHA entitled *Alice Oliver et al. v. Oakland Housing Authority et al.*, Alameda County Municipal Court No. 574817, ("*Oliver v. OHA*") wherein Mr. Murcko alleged that OHA's public housing constituted a nuisance as a result of "lack of security for tenants by

the allowance of drug dealers." (A true and correct copy of the First Supplemental Complaint for Damages dated January 27, 1997 in that matter is attached hereto as Exhibit "A". See Paragraph 32, subparagraph g, page 15 therein for the reference to drug dealers.)

2. During the deposition of Patricia Blackwell, one of the public housing tenant-plaintiffs in the *Oliver v. OHA* matter, on January 3, 1997, Mr. Murcko stated,

> The law is that a landlord has to provide security. If there's drug problems, the law says the landlord has to eliminate that problem. That's the law ma'am. That is the law. [Blackwell Depo. 45:11-14]

3. The deponent, Ms. Blackwell, indicated that as a tenant of public housing, she would like to see OHA take action to rid public housing of tenants who are dealing drugs, as follows,

> Q: What do you expect OHA, your landlord, to do about drug dealers?
>
> . . .
>
> A: I expect them to have them removed. [Blackwell Depo. 47:14-18]

4. True and correct copies of relevant pages of the deposition transcript of Patricia Blackwell are attached hereto as Exhibit "B". The original of this deposition

transcript has been lodged with the Court and is part of the file *Oliver v. OHA*.

Dated: April 16, 1998 Respectfully sumbitted

LAFAYETTE, KUMAGAI & CLARKE

/s/ SUSAN T. KUMAGAI
SUSAN T. KUMAGAI
Attorneys for Defendants
HAROLD DAVIS and OAKLAND HOUSING AUTHORITY

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781 CRB

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE AND BARBARA HILL, PLAINTIFFS

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DOES I-XXX, DEFENDANTS

[DATE: May 8, 1998
TIME: 10 a.m.
DEPT.: 8 [illegible] Fl.]

DECLARATION OF BARBARA HILL IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

DECLARATION OF BARBARA HILL

I, Barbara Hill, depose and say;

1. I am a tenant at 5120 Shafter Ave. #1, in Oakland, CA 94618. I am 63 years old. I have been a tenant there for about 30 years.

2. My landlord is the Oakland Housing Authority.

3. I have been served a summons and complaint in an unlawful detainer action, *Oakland Housing Authority v.* [*Hill*], case #013198, Oakland-Piedmont-Emeryville Judicial District, seeking my eviction.

4. The unlawful detainer complaint alleges that:

> On November 6, 1997, Oakland Housing Authority officers responding to complaints of individuals using narcotics and loitering in the parking lot area of the complex, contacted your grandson Donte McPherson, who is listed on your lease as a resident. As officers approached, one of the individuals with your grandson discarded a suspected marijuana cigarette. McPherson was informed of the complaint and admitted to smoking marijuana. A lease violation was submitted.

5. I have answered the unlawful detainer complaint denying the allegations.

6. The complaint does not allege that I had any prior knowledge of the alleged criminal activity or that I personally engaged in criminal activity, which is the basis of the eviction action.

7. I did not engage in any criminal drug activity. I had no knowledge of any criminal drug activity occuring on the premises. I did not permit activity or cause other others to engage in activity, because I had no knowledge of any activity.

8. I have informed the members of my household numerous times that no drug related or criminal activity is permitted in my home or on the premises.

I declare that the preceding is true and correct to the best of my knowledge and recollection under the penalty of perjury. Executed in Oakland on February 26, 1998.

/s/ BARBARA HILL
BARBARA HILL

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781 CRB

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE AND BARBARA HILL, PLAINTIFFS

v.

HAROLD DAVIS; OAKLAND HOUSING AUTHORITY; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DOES I-XXX, DEFENDANTS

[DATE: May 8, 1998
TIME: 10 a.m.
DEPT.: 8 [illegible] Fl.]

DECLARATION OF WILLIE LEE IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

DECLARATION OF WILLIE LEE

I, Willie Lee, depose and say;

1. I am a tenant at 5120 Shafter Ave. #4, in Oakland, CA 94618. I am 71 years old. I have been a tenant there for about 25 years.

2. My landlord is the Oakland Housing Authority.

3. I have been served a summons and complaint in an unlawful detainer action, *Oakland Housing Authority v. Lee*, case #013197, Oakland-Piedmont-Emeryville Judicial District, seeking my eviction.

4. The unlawful detainer complaint alleges that:

> On November 6, 1997, Oakland Housing Authority officers responding to complaints of individuals using narcotics and loitering in the parking lot area of the complex, contacted defendant's grandson Robert Lee, who is listed on defendant's lease as a resident. As officers approached, Lee discarded a suspected marijuana cigarette. He was informed of the complaint and admitted to smoking marijuana. A search of Lee's left front jacked [sic] revealed a ziplock baggie containing marijuana. Lee was cited for possession of marijuana.

5. I have answered the unlawful detainer complaint denying the allegations.

6. The complaint does not allege that I had any prior knowledge of the alleged criminal activity or that I personally engaged in criminal activity, which is the basis of the eviction action.

7. I did not engage in any criminal drug activity. I had no knowledge of any criminal drug activity occuring on the premises. I did not permit activity or cause other others to engage in activity, because I had no knowledge of any activity.

8. I have informed all of the members of my household that drug related activity and criminal activity is not permitted in my home or on the premises.

I declare that the preceding is true and correct to the best of my knowledge and recollection under the penalty of perjury. Executed in Oakland on February 26, 1998.

/s/ WILLIE LEE
WILLIE LEE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781 CRB

PEARLIE RUCKER; HERMAN WALKER; WILLIE LEE AND BARBARA HILL, PLAINTIFFS

v.

HAROLD DAVIS, OAKLAND HOUSING AUTHORITY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DOES I-XXX, DEFENDANTS

[DATE: May 8, 1998
TIME: 10 a.m.
DEPT.: 8 [illegible] Fl.]

DECLARATION OF HERMAN WALKER IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

DECLARATION OF HERMAN WALKER

I, Herman Walker, depose and say;

1. I am a tenant at 1621 Harrison Street #1309, in Oakland, CA 94612. I am 75 years old. I am disabled. My feet swell, my legs, my back, and my neck are in poor condition. I have arthritis. I have problems with my stomach. I have problems walking and usually need a cane. I have been periodically put on oxygen due to shortness of breath. The left side of my body, particularly my left hand, is stiff and semi-paralyzed. When I get upset or when I am under stress, I

sometimes cannot remember what I am saying, and I suffer from disorientation, and confusion. I am hard of hearing. I am no longer capable of living independently and I require an in-home health care taker.

2. My landlord is the Oakland Housing Authority.

3. I have been served a summons and complaint in an unlawful detainer action, *Oakland Housing Authority v. Walker*, case #011040, Oakland-Piedmont-Emeryville Judicial District, seeking my eviction.

4. The unlawful detainer complaint alleges that:

> On August 7, 1997, Oakland Housing Authority officers conducting a security check at your complex, which is a senior citizen building, contacted Kelly Shine. Shine, who was not a senior citizen and very fidgety showed signs of being a narcotics user. Officers contacted Shine and a check was conducted. Officers discovered that Shine is on probation with a search clause for narcotics. Officers invoked the search privilege recovering one rock of cocaine and a cocaine pipe. Shine was arrested for possession of narcotics and paraphernalia. Shine told officers she was at your unit with a friend who lived with you. You are the only resident listed on your lease. Officers went to your unit and contacted you. You gave officers permission to search your unit, and once inside they contacted Shine's minor child, Shirley Hardaway, who was wearing a thin nightgown and appeared to be residing in your unit, Marguerite Wise and Eleanor Randle, who has had several narcotics arrests at your complex.

As officers searched your unit, they recovered a cardboard box inside your bedroom containing a plate with suspected rock cocaine chips and four metal crack cocaine pipes. Randle, who had a cocaine pipe pinned inside her jacket, was arrested for possession of narcotics paraphernalia. In addition, officers observed a large amount of women's clothing and personal items throughout you unit. You denied that anyone was residing with you. A lease violation was drafted.

A week later, August 12, 1997, OHA officers and your housing manager returned to your unit to conduct a follow-up check. During the August 7 contact with you, officers had observed a sign posted on your front door stating "oxygen no smoking." However, your guests were smoking inside your unit. During that contact officers also observed an oxygen machine and several oxygen bottles. As officers and your manager entered your unit with your permission, they again contacted Hardaway in your bedroom wearing a night gown and robe. You again denied that Hardaway resided in your unit. Officers found a rock cocaine pipe inside a bag of hair rollers. As officers informed you of the paraphernalia you stated, you could not control what people brought into your unit. A lease violation was drafted.

On October 11, 1997, Oakland Housing Authority officers conducting a security check inside your complex, contacted Eleanor Randle in the lobby area. Randle told officers she had just left your unit and her friend Shirley Hardaway was still inside your unit. Officers were aware of Randle's narcotic

activity and prior arrest at your unit. Officers contacted you in your unit and you consented to a search. Once inside, officers contacted Shirley Hardaway sitting on a sofa in your living room. Hardaway was asked to sit in another area as officers conducted their search. In the creases of your sofa where Hardaway had been sitting officers recovered a glass cocaine pipe. Hardaway admitted to using rock cocaine, but denied that the pipe belonged to her. Hardaway was cited for possession of narcotics paraphernalia.

5. I have informed all of my family members, my caretakers, and my guests, that drug related activity and criminal activity are not permitted in my home or on the premises.

6. The complaint does not allege that I had any prior knowledge of the alleged criminal activity or that I personally engaged in criminal activity, which is the basis of the eviction action.

7. I have answered the complaint denying the allegations.

8. My in-home caretaker was Eleanor Randle. I fired her shortly after I learned that she had been accused of drug activity in my apartment.

9. I did not engage in any criminal drug activity. I had no knowledge of any criminal drug activity occuring on the permises. I did not permit activity or cause other others to engage in activity, because I had no knowledge of any activity.

I declare that the preceding is true and correct to the best of my knowledge and recollection under the penalty of perjury. Executed in Oakland on March 2, 1998.

/s/ HERMAN WALKER
HERMAN WALKER

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781 CRB

PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE AND BARBARA HILL, PLAINTIFFS

v.

HAROLD DAVIS, OAKLAND HOUSING AUTHORITY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DOES I-XXX, DEFENDANTS

[DATE: May 8, 1998
TIME: 10 a.m.
DEPT.: 8 [illegible] Fl.]

DECLARATION OF PEARLIE RUCKER IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF

DECLARATION OF PEARLIE RUCKER

I, Pearlie Rucker, depose and say;

1. I am a tenant at 2005 East 21st Street #102, Oakland CA 94606. I am 63 years old. I have been a tenant there for about 21 years.

2. My landlord is the Oakland Housing Authority.

3. I have been served a summons and complaint in an unlawful detainer action, *Oakland Housing*

Authority v. Rucker, case #012528, Oakland-Piedmont-Emeryville Judicial District, seeking my eviction.

4. The unlawful detainer complaint alleges that:

> On March 9, 1997, and Oakland Housing Authority officer on patrol in the 2200 block of E. 19th Street, observed defendant's daughter Gelinda Rucker, who is listed on defendant's lease as a resident, drinking an alcoholic beverage in public. When the officer contacted Rucker she attempted to conceal the alcohol. Rucker, who was near defendant's complex, appeared to be under the influence and was arrested for being drunk in public. A search of Rucker revealed one rock of suspected cocaine and a crack cocaine pipe. She was additionally charged with possession of narcotics and paraphernalia. Rucker listed defendant's address as her residence.
>
> On September 19, 1997, Oakland police officers on patrol in the 1400 block of 23rd Avenue, which is an area high in use and sale of narcotics, observed defendant's son Michael Rucker and William Knight loitering at a bus stop. Rucker was contacted and subsequently arrested for a warrant. As officers searched Rucker, they recovered a piece of rock cocaine. He was additionally charged with possession of narcotics. Rucker, who is not listed on defendant's lease as a resident, listed defendant's address as his residence.

5. I have answered the unlawful detainer complaint denying the allegations.

6. My son, Michael Rucker, has not lived with me since the early 1980's.

7. My daughter, Gelinda Rucker, is severely mentally disabled. She was born with a mental disability. She started seeing a psychiatrist when she was 13 or 14 years old. The doctor said she had to be on regular medication. She began taking a medication which the doctor prescribed, I think it was prozac. She is incapable of caring for herself or for her children. As a result, I am the primary caregiver for my grandchildren. For her mental disability, my daughter receives SSI. About seven years ago I suspected my daughter had an alcohol problem based on physical observation, and I had her placed in a residential drug and alcohol treatment program. When she got out of the program, I thought she had been cured. When I first suspected that she had an alcohol problem, I began searching her room when I cleaned it, about once or twice a week, for any evidence of drug or alcohol problems. I have continued to do so over the last 7 years or so, up through the present. I have never found any drugs or drug paraphernalia. I have found beer cans and occasionally a wine bottle. Prior to her recent arrest, I never observed any physical signs of drug use. She is presently incarcerated and in a drug program.

8. The complaint does not allege that I had any prior knowledge of the alleged criminal activity or that I personally engaged in criminal activity, which is the basis of the eviction action.

9. I did not engage in any criminal drug activity. I had no knowledge of any criminal drug activity occuring on the premises. I did not permit activity or

cause other others to engage in activity, because I had no knowledge of any activity.

10. I have informed all of my family members that drug related activity is not permitted in my home or on the premises.

I declare that the preceding is true and correct to the best of my knowledge and recollection under the penalty of perjury. Executed in Oakland on March 3, 1998.

/s/ PEARLIE RUCKER
PEARLIE RUCKER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-98-00781

PEARLIE RUCKER, ET AL., PLAINTIFFS

v.

HAROLD DAVIS, ET AL., DEFENDANTS

Filed: Apr. 17, 1998

DECLARATION OF RON SMITH IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Ron Smith, declare:

1. I am a Housing Manager for the Western District of defendant Oakland Housing Authority ("OHA"). I make this declaration of my own personal knowledge and can competently testify thereto if called as a witness.

2. I manage OHA's apartments located at 2005 East 21st Street, Apt. 102, Oakland, including, the apartment leased by plaintiff, Pearlie Rucker.

3. Ms. Rucker has signed a lease, which at Paragraph 9, details the obligations of the tenant and his or her guests and members of household, in pertinent part:

Tenant is also responsible for causing members of her household and guests to comply with the following: . . .

m. To assure that tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in: (i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents, . . . (ii) Any drug-related criminal activity on or near the premises (e.g., manufacture, sale, distribution, use, or possession of illegal drugs or drug paraphernalia, etc.)

(A true and correct copy of Ms. Rucker's lease is attached hereto as Exhibit "A".)

4. Paragraph 12 of the lease provides OHA with a right to inspect the units, as follows:

c. Management may enter tenant's dwelling unit as follows:

1) Management shall provide Tenant with two days written notice stating the purpose of its entry to the dwelling unit. Management entry shall be between the hours of 8:00 a.m. and 4:30 p.m. for the purpose of performing routine inspections and maintenance and for making repairs and improvements.

2) Management may enter the premises at any time without advance notification when there is a reasonable cause to believe an emergency exists.

5. Inspections of units are conducted when, among other things, tenants are suspected of lease violations, including violations of Paragraph 9.

6. As far as I am aware, all leases, including those of private landlords, include provisions similar to Paragraph 12, allowing the landlord/housing manager to inspect its property under like circumstances.

7. In addition to executing the lease, on a yearly basis, Ms. Rucker signs a form entitled "Occupant's Responsibility," which provides, in pertinent part:

As I am the lessee of this apartment, I am responsible for all damages and the conduct of all activities in my apartment. Should I violate the terms and conditions of my lease, I am aware that I could be subject to legal action.

(A true and correct copy of the Occupant's Responsibility form most recently executed by Ms. Rucker is attached hereto as Exhibit "B".)

8. Further, Ms. Rucker signs a yearly form entitled "Tenant Agreement To Maintain Drug-Free Environment," which provides, in pertinent part:

I am aware of the fact that Paragraph 9, Section m, of my lease specifically prohibits me, my household members or guest from using, selling or possessing any illegal drugs or drug paraphernalia on the Oakland Housing Authority (OHA) property. I also understand that if I or any member of my household or guest should violate this lease provision, I may face eviction action against me to terminate my tenancy with the Housing Authority.

(A true and correct copy of the Tenant Agreement To Maintain Drug-Free Environment form most recently executed by Ms. Rucker is attached hereto as Exhibit "C".)

9. When an apartment is vacated, OHA leases the apartment to the next person listed on a prioritized waiting list.

10. If an inspection of an apartment is conducted on the basis that a tenant and/or guest and/or member of the household is believed to be in violation of Paragraph 9, section m, by using, selling or possessing any illegal drugs or drug paraphernalia on OHA property, that inspection is done for the purpose of determining violations of the lease, and not for purposes of investigating and/or prosecuting for any criminal conduct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 16, 1998 in the city of Oakland, County of Alameda, California.

/s/ RON SMITH
RON SMITH

OHA\RUCK\SMITH.DEC

HOUSING AUTHORITY OF THE CITY OF OAKLAND CALIFORNIA

TENANT LEASE

Name of Tenant PEARLINE D. RUCKER

Account/Client No. 230581/408468

Tenant _____

Dwelling Unit No. 102

Number of Bedrooms (Unit Size) 4

Address 2005 E 21st Street #102,

Oakland, CA 94606-4270

Monthly Rent $ 261.00

Effective Date: February 1, 1997

The Housing Authority of the City of Oakland, California (Management) leases to PEARLINE D. RUCKER (Tenant), the dwelling unit described above under the terms and conditions stated within this lease. Except where otherwise indicated, the term "dwelling unit" refers to the apartment unit and adjacent area assigned for the Tenant's exclusive use and to the area(s) assigned in paragraph 10 of this lease.

1. **TERM OF THE LEASE**
   This lease is for a period of one calendar month.

2. **RENEWAL OF LEASE**
   This lease shall automatically renew each calendar month, unless terminated by either Management or Tenant as provided in this lease.

3. **MEMBERS OF HOUSEHOLD**
   Only the following persons may live in the dwelling unit with the named Tenant:

Name	Date of Birth	Social Security #
RUCKER, GELINDA	05/16/54	573-21-2526
FLETCHER, JACQUELINE	06/15/78	548-69-3773
ROBINSON, LATASHA	05/15/82	557-75-8995

4. **USE OF THE DWELLING UNIT BY MEMBERS OF THE HOUSEHOLD**

   No one other than those persons listed above may live in the dwelling unit for more than fourteen (14) days with the Tenant. (See paragraph 7.) Tenant is responsible for notifying Management of any change in his/her household within fourteen (14) days after the change occurs.

5. **PAYMENTS DUE UNDER THE LEASE**

   a. **Rental Payments**

      1) The first rent payment for the period beginning ____, 19___, and ending ____, 19__, is $___. This payment is due at the time this lease is signed.

      2) The monthly rent of $ 261.00 is due on or before the first of each month beginning February 1, 1997. This month rent may change

for reasons stated in Paragraph 6 of this lease.

3) The Tenant shall be responsible for rent for thirty (30) days after they give written notice of their intent to vacate; or in the absence of such written notice, for thirty (30) days from the day Management learns of the vacancy. If the end of this thirty (30) day period does not coincide with the end of a month, the rent due under this provision shall be prorated at a daily charge of 1/30 of the monthly rent amount.

4) If Tenant is transferring from one Oakland Housing Authority apartment to another, any charges due under the previous leases are due under this lease.

b. **Utilities**

Management shall pay the full cost of the following utilities and services:

1) Water, garbage collection, sewer service

2) The following will be provided or furnished by Management

YES	NO		YES	NO	
☐	☒	Gas	☐	☒	Gas Range
☐	☒	Electricity	☐	☒	Electric Range
☐	☒	Heat	☐	☒	Refrigerator

Tenant is responsible for the provision and payment of the full cost of any other utilities used. Management is not responsible for failure to furnish utilities by reason of any cause beyond its control.

c. **MAINTENANCE AND REPAIR CHARGES**

Tenant shall pay such charges for the repair of those damages which are beyond normal wear and tear to the dwelling unit, development buildings, facilities or common areas and for the cleaning and extermination made necessary by the action(s) or neglect of the Tenant, members of the household or guests.

All charges shall be billed according to the Schedule of Charges for Services or Repairs posted in the District and Central Management offices. The Charge schedule may be changed from time to time by Management and will be posted for thirty (30) days by Management before its effective date. Such schedule or its revisions are incorporated by reference herein. The bill shall specify the damages, work done, and the cost. Payment shall not be due until two weeks after written notice to the tenant of the charges.

d. **SECURITY DEPOSIT**

1. **Amount**

Tenant shall pay for a Security Deposit of the lesser of two hundred fifty dollars ($250.00) or the equivalent of two months gross rent.

2. **Payment method**

a. Payment of the security deposit as determined in #1 above, is due at move-in unless the resident provides a stove, or in the case of extreme hardship.

b. If a resident provides a stove, or in the case of extreme hardship, the resident shall pay the security deposit in installments as follows:

Upon commencement of tenancy, tenant shall pay fifty dollars ($50.00) of the security deposit. The balance shall be paid in ten (10) equal installments (rounded off to the nearest dollar), with the first installment due at the beginning of the second month of tenancy.

The security deposit shall be used by Management at lease termination to pay for the cost of repair of damages, (including cleaning of the dwelling unit, development buildings, facilities, and common areas) caused by the Tenant, members of the household, or guests. The security deposit shall also be used by Management to apply to any rent or other charges owed by the Tenant at lease termination.

Management shall return the security deposit or any balance of the deposit within fourteen (14) days after the Tenant vacates the dwelling unit.

6. **REDETERMINATION OF RENT, DWELLING UNIT SIZE AND ELIGIBILITY**

a. Tenant shall report to Management within fourteen (14) days of occurrence, any change in the household composition (such as changes in the number of persons in the household). Failure to do so will result in a lease violation which may cause Management to take steps to terminate the lease.

b. All determinations, referred to in this paragraph shall be made in accordance with Management's approved Occupancy Policy and Schedule of Rents, available in the District Housing Management Office.

c. **Regular Redeterminations**

1) Management shall periodically determine:

a) Whether Tenant's rent should be changed.

b) Whether Tenant's dwelling unit size is still appropriate for Tenant's family composition.

2) The periodic determination referred to in section c. 1) above shall occur:

a) Upon occupancy.
b) Once each year.
c) Other times as needed.

3) As requested by Management at the time specified in section c.2 above, Tenant shall provide accurate, written, current, verifiable information to Management as to:

a. Composition of household (number of people in Tenant's household, their sex and any other information required by Management).

b. The source and amount of income received by everyone in Tenant's household. Current written verification acceptable to Management must be provided within fifteen (15) days of notification to Tenant.

c. Any unusual expenses or circumstances which create a financial burden on the household (For example, some medical costs or child care costs may be considered unusual expenses, when verified in writing).

Failure to do so is a material violation of this lease.

d. Interim Redeterminations

1) The rent shown in paragraph 5, or as adjusted as set forth herein, shall remain in effect during the period between regular redeterminations unless Tenant's rent should be adjusted in accordance with the Authority's Occupancy Policy and Schedule of Rents. The Tenant is responsible for providing written proof of such change to Management.

2) When Tenant reports a change in household circumstances (such as a decrease in income) Tenant's rent shall be redetermined and adjusted as indicated by the Authority's Occupancy Policy Schedule of Rents.

3) In the event Tenant's rent is reduced as set forth herein, Tenant shall within thirty (30) days of occurrence report any further change in family circumstances (such as an increase in income) which occur prior to the next regular redetermination

e. If Management determines that the size of the Tenant's present unit is no longer appropriate to Tenant's household composition in accordance with the Authority's Occupancy Policy, the Tenant shall move to a unit of an appropriate size within thirty (30) days of notification by Management of the availability of an appropriate size vacant dwelling unit. If the tenant fails to move as requested by Management, Management has the right to take appropriate legal action, as determined by Management.

f. When the Tenant does not agree with Management's redetermination of the amount of rent payable by the Tenant (not including determination of the Housing Authority's schedule of Utility Allowances) or determines that the Tenant must transfer to another unit based on family composition, the Tenant may ask for an explanation of the determination and request a hearing under the Housing Authority's Grievance Procedures.

7. TENANT'S RIGHT TO USE AND OCCUPY

Tenant's household has the right to exclusive use and occupancy of the dwelling unit. This right includes having guests stay in the dwelling unit up to fourteen (14) days, or a longer period only when the prior written consent of Management has been obtained.

8. MANAGEMENT'S OBLIGATIONS

Management is obligated to:

a. Maintain the dwelling unit, development buildings, facilities, and common areas in a decent, safe and sanitary condition

b. Comply with the requirements of the applicable building codes, housing codes, and regulations of the Department of Housing and Urban Development (HUD), materially affecting health and safety.

c. Make necessary repairs to the premises.

d. Keep development buildings, facilities, and common areas, not otherwise assigned to tenants for maintenance and upkeep in a clean and safe condition.

e. Maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, and other facilities and appliances, including elevators, supplies or required to be supplied by Management.

f. Provide and maintain trash and garbage receptacles for the deposit of garbage, rubbish and other waste removed from the dwelling unit by the tenant in accordance with paragraph 9.h of this lease.

g. Supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage) except where heat or hot water is generated by an installation within the Tenant's exclusive control is supplied by a direct utility connection.

h. Notify tenant of the specific grounds for any proposed adverse action by Management.

9. OBLIGATIONS OF TENANT, MEMBERS OF HOUSEHOLD, AND GUESTS

Tenant is obligated to comply with the following rules. Tenant is also responsible for causing members of the household and guests to comply with the following.

a. To pay rent when due (see Paragraph 5, a).

b. Not to assign the lease or to sublease the dwelling unit.

c. Not to provide accommodations for boarders or lodgers.

d. To use the dwelling unit solely as a private dwelling for the Tenant and the Tenant's household as identified in Paragraph 3, and not to use the dwelling unit or permit its use for any other purpose.

e. To abide by the House Rules for the benefit and well-being of the housing development and the tenants as posted in the District Office, and by this reference incorporated herein.

f. To comply with all obligations imposed upon Tenants by applicable provisions of building and housing codes materially affecting health and safety, incorporated herein.

g. To keep the dwelling unit and such other areas as may be assigned to the tenant for the tenant's exclusive use in a clean and safe condition (E.G. if required resident must provide an operating stove.)

h. To dispose of all garbage, rubbish, and other waste from the dwelling unit in a sanitary and safe manner

i. To use only in a reasonable manner all electrical, plumbing, heating, ventilating, air conditioning, elevators and other facilities and appurtenances in the development buildings and common areas.

j. To refrain from scattering rubbish, destroying, defacing, damaging, or removing any part of the dwelling unit or development.

k. To pay reasonable charges (other than for wear and tear) for the repair of damages to the dwelling unit, development, buildings, facilities,

or common areas caused by either intentional or negligent conduct of Tenant, members of the household, or guests.

l. To conduct himself/herself and cause other persons who are in the dwelling unit or in the common area of development with Tenant's consent to conduct themselves in a manner which will not disturb neighbors (including those neighbors who are not tenants of low rent public housings) peaceful enjoyment of their housing and which will be conducive to maintaining the development in a decent, safe and sanitary condition.

m. To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in
(i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents, or threatens the health and safety of the housing authority employees (e.g., violent acts, possession of illegal firearms, electrical/gas meter tampering, etc.)
(ii) Any drug-related criminal activity on or near the premise (e.g., manufacture, sale distribution, use, or possession of illegal drugs or drug paraphernalia, etc.)

n. Not to make any repairs or alterations or install permanently affixed carpet or any equipment including antennas, or to use a water bed without the prior written consent of Management.

o. Not to keep or permit to keep any dogs, cats, or other pets in or about the premises which results in a risk to personal health or safety of any person or damage to property.

p. Not to create (by act or omission) or permit to exist any condition on the premises which results in risk to personal health or safety of any person or damage to property (if required resident must provide for the uninterrupted provision of electric and gas services.)

q. To immediately report to Central Maintenance any vandalism to the premises and any need for repair to the interior or exterior of the dwelling unit and any other area used by the Tenant in connection with the Tenant's occupancy of the dwelling unit.

r. To participate in a training program on housekeeping and home care skills if requested to so by the Management. Such training shall be provided by Management.

10. GROUNDS MAINTENANCE

Tenant shall maintain walkways, stairs, landings, hallways, grounds, patios, and landscaping adjacent to the dwelling unit. Management must be notified if the Tenant is unable to maintain the grounds due to the age or physical condition in the event Tenant neglects to maintain the areas assigned. Tenant shall pay to Management all expenses necessary for Management to maintain or repair these areas.

11. Hazardous Defects

Tenant shall take every care to prevent fires, not to keep any gasoline or gasoline operated device, solvents, or other combustible materials or substances in any part of or around the apartment, balconies, or enclosed spaces and to exercise particular caution with respect to children playing with matches and/or lighters.

In the event the dwelling unit is damaged to the extent that conditions are created which are hazardous to life, health or safety of the occupants

a. Tenant shall immediately notify the fire department (in case of fire), Central Maintenance, Security and Management

b. Management shall be responsible for repair of the dwelling unit within a reasonable time. If the damage is caused by Tenant, members of the household or guests, Tenant shall pay the reasonable costs of repair.

c. Management shall offer standard alternative housing, if available, where necessary repairs cannot be made in a reasonable time.

d. In the event repairs are not made within a reasonable time, or alternative housing is not available, Tenant shall pay a lower rent in proportion to the seriousness of the damage and loss of value as a dwelling. Tenant shall not pay a lower rent if s/he refuses the decent, safe and sanitary alternative housing or if the damage was caused by Tenant, members of the household or guests.

12. INSPECTIONS AND ACCESS

a. Before move-in, Management and Tenant shall inspect the dwelling unit. Management shall give Tenant a written statement of conditions of the dwelling unit and the equipment provided with the unit. The statement shall be verified and signed by Management and Tenant.

b. When Tenant moves out, Management shall inspect the unit and furnish tenant with a written statement of damages for which Tenant is responsible. Such statement is subject to modification upon further inspection by the Maintenance Department. Tenant may inspect the unit with Management unless Tenant leaves without giving prior notice.

c. Management may enter tenant's dwelling unit as follows:

1) Management shall provide Tenant with two days written notice stating the purpose of its entry to the dwelling unit. Management entry shall be between the hours of 8:00 and 4:30 p.m. for the purposes of performing routine inspections and maintenance and for making repairs and improvements.

2) Management may enter the premises at any time without advance notification when there is a reasonable cause to believe that an emergency exists, and

3) If all adult members of the household are absent at the time of entry, Management shall leave in the dwelling unit a written

statement specifying the date, time and purpose of entry.

13. NOTICE

a. Any notice to Tenant from Management shall be in writing, a) delivered personally to Tenant or to an adult member of Tenant's household, or b) sent by prepaid first class mail properly addressed to Tenant. If the Tenant is visually impaired, any notice to the tenant of an adverse action will be in an accessible format.

b. Any notice Tenant gives to Management shall be in writing, delivered either to the District Management Office responsible for the development in which the dwelling unit is located, or Management's Central Office.

14. TERMINATION OF THE LEASE

a. This lease may be terminated by Tenant at any time by giving thirty (30) days written notice to Management in the manner specified in Paragraph 13. Tenant shall leave the dwelling unit in a clean and good condition and return the keys to Management when Tenant moves out.

b. If, though any cause, a signer of the lease ceases to be a member of Tenant's household, this lease shall terminate. A new lease may be executed and signed by the responsible remaining adult member of the household provided s/he conduct his or herself as required by the terms and provisions of the lease and the family continues to be eligible for low-rent housing.

c. If Tenant transfers to another apartment operated by Management, this lease shall terminate and a new lease shall be executed for the dwelling unit into which Tenant moves.

d. Management may terminate or refuse to renew this lease for the Tenant's serious or repeated violation of material terms of this lease, such as not making payments due, not complying with paragraph 9, or other good cause.

e. Management shall give Tenant written notice of termination of the lease, stating specific grounds for termination, and informing the tenant of the right to examine documents in the tenant's file directly related to the termination of tenancy, by:

1) Fourteen (14) days in the case of failure to pay rent;

2) A reasonable time proportionate to the urgency of the situation in the case of creation or maintenance of a threat to the health or safety of other tenants or Management's employees. Under this provision, Management considers any fire caused by the action or failure to act on the part of the Tenant, household members, or guests as grounds for termination of the lease for the affected apartment or other apartment to which the Tenant and Tenant's household have been transferred. Management also considers any criminal activity that threatens the health, safety or right to peaceful enjoyment of the development by other residents or any drug-related activity on or

near such premises by Tenant, members of household, or guests as grounds for termination under this provision.

3) Thirty (30) days in all other cases.

15. ABANDONMENT OF PROPERTY

If Tenant is absent from the dwelling unit for fourteen (14) consecutive days and rent is owed. Tenant shall, at the option of Management, be considered to have abandoned the dwelling unit. Management may then proceed to repossess the unit and dispose of the tenant's personal property pursuant to state law.

16. WAIVER OF LEASE PROVISIONS

Management does not give up any of its rights to enforce the provisions of this lease unless it does so in writing. For example, Management does not give up its right to pursue an eviction action if it collects rent knowing that Tenant has not fulfilled Tenant's responsibilities under this lease.

17. GRIEVANCE PROCEDURE

All disputes about the lease or concerning the responsibilities of Tenant's household or Management shall be resolved in accordance with the Oakland Housing Authority Grievance Procedure. The Grievance Procedure is posted in the District and Central Management Offices and is incorporated in this lease by reference.

18. ATTORNEY FEES AND COURT COSTS

In the event that the Authority or Tenant shall commence any legal action or proceeding against the other to enforce any convenant, term or con-

dition of this lease, the prevailing party shall be entitled to recover an award of reasonable attorney fees and court costs.

19. PROVISION FOR MODIFICATION

a. Changes to this lease, other than changes in Tenant rent amount, shall be written addendum signed by both Management and Tenant.

b. The Schedule of Charges for Service and Repairs, Schedule of Rents, Re-examination Schedule, House Rules, and Grievance Procedure, all incorporated into this lease by reference, may be changed from time-to-time by Management. Tenant shall be given thirty (30) days written notice setting forth the proposed changes, the reasons for them, and providing Tenant with an opportunity to make written comments. Tenant's written comments shall be taken into consideration by Management before the proposed changes become effective. A copy of such notice shall be

1) Delivered directly or mailed to Tenant; or

2) Posted in the District and Central Management Offices.

By signing below, Tenant and Management enter into this lease which shall take effect on the "Effective date" shown on the top of page 1 of this lease.

HOUSING AUTHORITY
OF THE CITY OF
OAKLAND, CALIFORNIA

PEARLIE RUCKER 12-17-96
TENANT (Date)

By (illegible) 12-17-96
PHA (Date)

_____
TENANT (Date)

Title Housing Manager
PHA (Date)

OHA OAKLAND HOUSING AUTHORITY

OCCUPANT'S RESPONSIBILITY

I, the undersigned, am aware that under the terms and conditions of the Housing Lease I just signed that it is a violation to allow anyone not listed on my lease to reside in my apartment.

As I am the lessee of this apartment, I am responsible for all damages and the conduct of all activities in my apartment.

Should I violate the terms and conditions of my lease, I am aware that I could be subject to legal action.

Lessee PEARLIE RUCKER
PEARLIE RUCKER

Date 4/13/98

WD 230581 408468
RUCKER, PEARLIE
2005 E 21ST. 102
OAKLAND, CA 94606-4270

Witnessed RONALD SMITH
RONALD SMITH
Housing Manager

Date 4/13/98

HE 9007

OKLAND HOUSING AUTHORITY

TENANT AGREEMENT TO MAINTAIN A DRUG-FREE ENVIRONMENT

The Okland Housing Authority's (OHA) police on drugs and drug-related criminal activity has been explained to me by my Housing Manager. Additionally, I have been told about the federal regulation regarding the "One Strike" policy, which states that I may be evicted from public housing for illegal use of a controlled substance or abuse of alcohol which interferes with the health, safety, or right of peaceful enjoyment of the premises by other residents by myself, any member of my household or guests.

I am aware of Paragrah 9, Section M, of my Lease Agreement which specifically prohibits the use, sale or possession of any illegal drugs or drug paraphernalia on OHA property by myself, any member of my household or guests. I am also aware that any drug-related criminal activity on or off the premises, not just on or near the premises, by myself or any member of my household is prohibited. I understand that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted.

I agree to comply with the OHA's policy regarding drugs and drug-related criminal activity and to do all I can to prevent the use, sale or possession of drugs in my unit or the involvement in drug-related criminal activity by my household or guests. I also agree to inform all my household members and guests of OHA's policy regarding drugs and drug-related criminal activity.

/s/ PEARLIE RUCKER — 4/13/98
Resident — Date

RONALD SMITH — 4/13/98
Housing Manager — Date

Supreme Court, U.S.
FILED
NOV 20 2001
OFFICE OF THE CLERK

Nos. 00-1770 and 00-1781

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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QUESTION PRESENTED

Section 1437d(*l*)(6) of Title 42 of the United States Code provides that public housing leases must contain a clause stating that "any drug-related criminal activity on or off [the] premises engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."

The question presented is:

Whether the lease clause provided for in 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999) is violated by drug-related criminal activity of household members, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug-related activity.

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In the Supreme Court of the United States

No. 00-1770

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

No. 00-1781

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-67a[1]) is reported at 237 F.3d 1113. The order of the court of appeals (Pet. App. 68a-69a) directing that the case be reheard en banc is reported at 222 F.3d 614. The opinion of the panel of the court of appeals (Pet. App. 70a-137a) is reported at 203 F.3d 627. The opinion of the district court (Pet. App. 138a-166a) is unreported.

[1] All citations to Pet. and Pet. App. are to the petition for certiorari and the appendix thereto in No. 00-1770.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. On April 11, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including May 24, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1437d(*l*) (1994 & Supp. V 1999) provides in pertinent part:

> (*l*) Leases; terms and conditions; maintenance; termination
>
> Each public housing agency shall utilize leases which—
>
> * * * * *
>
> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Other pertinent provisions of the United States Housing Act and regulations of the Department of Housing and Urban Development are set forth at Pet. App. 167a-172a and at App., *infra*, 1a-11a.

STATEMENT

This case concerns the meaning of a clause that the United States Housing Act requires each public housing agency (PHA) to include in leases of public housing units that receive federal housing assistance. The clause provides that drug-related criminal activity by specified individuals on or off the premises of the PHA is cause for termination of tenancy and hence ground for eviction. The Oakland Housing

Authority (OHA) instituted eviction proceedings against four tenants pursuant to a lease clause compelled by that provision of the Housing Act. The tenants instituted this action in the United States District Court for the Northern District of California to obtain an injunction against OHA's state court eviction actions. The district court issued a preliminary injunction barring OHA from terminating any lease of a tenant for drug-related criminal activity that occurred outside the tenant's apartment if the tenant did not know of, or have reason to know of, that activity. The court of appeals, sitting en banc, affirmed the district court's decision.

1. a. The United States Housing Act of 1937 (Housing Act), 42 U.S.C. 1437 *et seq.*, authorizes the Secretary of Housing and Urban Development (HUD) to make loans or loan commitments to public housing agencies to help finance the development, acquisition, or operation of low-income housing projects by such agencies. 42 U.S.C. 1437b(a). In 1988 and 1990, Congress amended the Housing Act in an effort to keep drug-related activity out of public housing. Congress made the following findings concerning the seriousness of the drug problem affecting public housing:

> (1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;
>
> (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of

> the physical environment that requires substantial governmental expenditures;
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities.

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. 11901 (1994 & Supp. V 1999)).[2]

In light of those findings, Congress mandated that "[e]ach public housing agency shall utilize leases which" provide that

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

§ 5101, 102 Stat. 4300.

That provision was reworded in 1990 without substantive change concerning drug-related criminal activity. As amended, the provision required that public housing leases

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

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[2] The words "or violent" were inserted after "drug-related" in paragraphs (2) and (4) by the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, §§ 586(b)(1) and (2)(A), 112 Stat. 2646. Additional findings were added by Section 586(b)(2)(B) of that Public Law.

Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4185. The provision was again amended in 1996 by changing the phrase "on or near such premises" to "on or off such premises." Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836. As so amended, the provision is now codified at 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999).[3] See also 42 U.S.C. 1437d(*l*) (1994 & Supp. V 1999) (defining "drug-related criminal activity" to mean "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in [21 U.S.C. 802 (1994 & Supp. V 1999]").

HUD's regulation establishing mandatory lease terms for public housing tenants closely tracks the statutory language. As recently amended, the regulation requires leases to impose an obligation on the tenant:

> (i) To assure that no tenant, member of the tenant's household, or guest engages in:
>
> (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or
>
> (B) Any drug-related criminal activity on or off the premises;
>
> (ii) To assure that no other person under the tenant's control engages in:
>
> (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or
>
> (B) Any drug-related criminal activity on the premises.

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[3] The provision was redesignated from paragraph (5) to paragraph (6) of Section 1437d(*l*) by Pub. L. No. 105-276, § 512(b)(1), 112 Stat. 2543.

66 Fed. Reg. 28,776, 28,802 (May 24, 2001) (to be codified at 24 C.F.R. 966.4(f)(12)(i)). The regulations further state that "[t]he lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy." 66 Fed. Reg. at 28,803 (to be codified at 24 C.F.R. 966.4(*l*)(5)(i)(B)). See also *id.* at 28,803 (to be codified at 24 C.F.R. 966.4(*l*)(2)(i)(B)) ("The PHA may terminate the tenancy only for" certain lease violations, including "[f]ailure to fulfill household obligations, as described in" 24 C.F.R. 966.4(f)(12)(i)).

b. When HUD issued its original regulations implementing Section 1437d(*l*)(6) shortly after its enactment, it made clear that a tenant's lease may be terminated for violation of the lease provision required by Section 1437d(*l*)(6) without regard to the tenant's knowledge of that activity.[4] HUD explained that permitting the landlord to evict a tenant for breach of lease obligations is a "normal and ordinary incident of tenancy," and that permitting eviction based on the behavior of household members gives the tenant and other household members "a strong motive to avoid behavior

[4] The original regulations required leases to impose an obligation on the tenant:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. 966.4(f)(12)(ii) (2000).

which can lead to eviction." 56 Fed. Reg. 51,560, 51,566 (1991). In light of Congress's determination that drug crimes "are a special danger to the security * * * of public housing residents," *id.* at 51,566-51,567, HUD considered it appropriate that the "tenant should not be excused from contractual responsibility by arguing that [the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit," *id.* at 51,567.

Thus, under HUD's interpretation, Section 1437d(*l*)(6) mandates a lease provision under which a PHA has "cause" to terminate a tenancy if the provision is violated, whether or not the tenant had knowledge of the drug-related criminal activity. But neither Section 1437d(*l*)(6) nor HUD's regulations *require* public housing authorities to terminate any tenancy. Instead, the decision whether to invoke the lease clause and evict a particular tenant is for the PHA to make. HUD's regulations provide that, in making that decision, "the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action." 66 Fed. Reg. at 28,803 (to be codified at 24 C.F.R. 966.4(*l*)(5)(vii)(B)); see also 24 C.F.R. 966.4(*l*)(5)(i) (2000) (predecessor regulation).

2. In late 1997 and early 1998, the Oakland Housing Authority instituted eviction proceedings in state court against four public housing tenants who are plaintiffs in this case and respondents in this Court—Pearlie Rucker, Willie Lee, Barbara Hill, and Herman Walker. In each case, OHA alleged that the tenant had violated paragraph 9(m) of his or her lease, a provision that implements Section 1437d(*l*)(6) and that obligates the tenant to "assure that tenant, any member of the household, or another person under the ten-

ant's control, shall not engage in * * * [a]ny drug-related criminal activity on or near the premises." Pet. App. 5a-6a; J.A. 20-21, 46. Each tenant had also signed an agreement stating that the tenant is "aware of" paragraph 9(m); that the tenant is "aware that any drug-related criminal activity on or off the premises * * * by myself or any member of my household is prohibited"; and that the tenant "understand[s] that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted." J.A. 69 (Rucker); OHA C.A. E.R. 81 (Hill), 80 (Lee), 62 (Walker).

Pearlie Rucker is a 63-year-old woman who has lived in public housing since 1985. OHA's complaint alleged that her daughter, who resides with her and is listed on her lease as a resident, was found with cocaine and a crack cocaine pipe three blocks from Rucker's apartment. OHA subsequently obtained a dismissal of the complaint without prejudice in February 1998. Pet. App. 6a, 141a; J.A. 13, 42.

Willie Lee is 71 years old and has lived in public housing for more than 25 years. OHA's complaint alleged that Lee's grandson, who resides with her and is listed on her lease as a resident, was caught smoking marijuana in the apartment complex parking lot. Pet. App. 6a; J.A. 18, 34.

Barbara Hill is 63 years old and has lived in public housing for more than 30 years. OHA's complaint alleged that Hill's grandson, who resides with her and is listed on her lease as a resident, was caught with Lee's grandson in the apartment complex parking lot and admitted smoking marijuana. Pet. App. 6a; J.A. 19, 31.

Herman Walker is a disabled 75-year-old man who has lived in public housing for ten years. OHA's complaint alleged that on three instances within a two-month period, Walker's in-home caregiver and two others were found with cocaine in Walker's apartment. Each time, Walker was issued a notice of lease violation. After the third notice and

OHA's initiation of the eviction action, Walker fired his caregiver. Pet. App. 6a; J.A. 15-17, 37-39.

3. Following the institution of eviction proceedings against them in state court, the four tenants commenced this action in the United States District Court for the Northern District of California. They sought, *inter alia*, a preliminary injunction that would prohibit OHA from evicting any tenants without proof of "the tenant's personal participation in, prior knowledge of, and actual ability to prevent drug-related or other criminal activity." J.A. 24, 25.

The district court issued a preliminary injunction prohibiting OHA "from terminating the leases of tenants * * * for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, and had no reason to know of, the drug-related criminal activity." Pet. App. 165a-166a; see generally *id.* at 138a-166a. The injunction is not limited merely to the four tenants who had brought the case, but broadly applies to all "leases of tenants." *Id.* at 165a. The court also enjoined OHA from proceeding with any of the three eviction actions that remained pending in state court after the state eviction proceeding against Rucker was dismissed. *Id.* at 166a. The court noted, however, that OHA "is not preliminarily enjoined from evicting tenants * * * for drug-related criminal activity in the tenant's apartment, regardless of whether the tenant knew, or had reason to know, of the criminal activity," except for Walker, the validity of whose eviction, the court concluded, would turn on the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* Pet. App. 165a-166a; see also *id.* at 162a-163a.[5]

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[5] The court held that "[p]laintiffs may not state a claim under the ADA against HUD as the ADA does not apply to actions taken by the federal government." Pet. App. 153a. The court, however, permitted Walker's ADA claim to proceed against the Oakland defendants, *id.* at 156a-157a, and issued a preliminary injunction barring Walker's eviction

4. A divided panel of the Ninth Circuit reversed the district court's decision and vacated the preliminary injunction. Pet. App. 70a-137a. The panel "concluded that the plain language of 42 U.S.C. § 1437d(*l*)(5), considered both by itself and in light of the broader statutory context, makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity." *Id.* at 107a. Judge William Fletcher dissented. *Id.* at 115a-137a.

5. a. The court of appeals ordered rehearing en banc. Pet. App. 68a-69a. By a 7-4 vote, the en banc court affirmed the preliminary injunction. *Id.* at 1a-67a. The court held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." *Id.* at 26a. Rejecting HUD's contrary interpretation of the statute, the court concluded that "Congress had an intention on the precise question at issue that is contrary to HUD's construction," and that therefore "HUD's interpretation is not entitled to deference" under *Chevron*. *Id.* at 11a.

The court acknowledged that the text "does not compel either party's interpretation" because it "does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted." Pet. App. 12a. The court was of the view, however, that to construe Section 1437d(*l*)(6) to permit eviction

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with respect to his ADA claim, *id.* at 165a, 166a. The district court rejected Rucker's ADA claim on the ground that she does not allege that she is disabled. *Id.* at 155a. The court of appeals affirmed the preliminary injunction concerning Walker's ADA claim. *Id.* at 29a-31a. The ADA issue was not presented in HUD's petition, see Pet. 21 n.7, or in the Oakland Housing Authority's petition. See 00-1783 Pet. i (question presented referring only to the Housing Act), 4 n.3.

of tenants who did not know or have reason to know of the drug-related activity would "require PHAs to include an unreasonable term in their leases," in violation of 42 U.S.C. 1437d(*l*)(1), which prohibits "unreasonable" PHA lease terms. *Id.* at 15a.

The court also noted that in 1988, when Congress first enacted what is now Section 1437d(*l*)(6), Congress amended a pre-existing civil forfeiture provision in 21 U.S.C. 881(a)(7) (1988) that already had an express "innocent owner" defense. The amendment added leasehold interests to the property subject to forfeiture when used to commit or facilitate a drug-related offense. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5105, 102 Stat. 4301. The court "presume[d]" that Congress meant for the amended forfeiture provision and Section 1437d(*l*)(6) "to be read consistently." Pet. App. 17a.

The court relied as well on a Senate Report discussing one version of a bill before Congress in 1990, when it amended Section 1437d(*l*)(6). The report stated that the committee "anticipates that each case will be judged on its individual merits" and that eviction of an unknowing tenant would neither be the "appropriate course," S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990), nor constitute "good cause" to evict, *id.* at 127.

The court also expressed the view that HUD's interpretation of Section 1437d(*l*)(6) would lead to "absurd results." Pet. App. 21a. The court stated that "there was nothing more Pearlie Rucker could have done to protect herself from eviction"; that "the statute would * * * permit eviction * * * if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana"; and that "the provision would * * * authorize eviction if a household member had been convicted of a drug crime years earlier." *Id.* at 22a.

Finally, the court held that the principle of construing a statute to avoid substantial constitutional concerns sup-

ported its result, because "[p]enalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause." Pet. App. 24a. The court distinguished *Bennis* v. *Michigan*, 516 U.S. 442 (1996), which permitted forfeiture of a wife's interest in a car because of her husband's use of the car to engage in sexual activities with a prostitute, conduct of which the wife was unaware. The court pointed out that the property in *Bennis* had been "used in criminal activity," while the leasehold interests here (with the exception of the one in Walker's case) had not been. Pet. App. 25a.

In affirming the preliminary injunction, the court of appeals noted that the injunction does not necessarily bar OHA from pursuing evictions based on drug-related activities that occur in the tenant's unit, regardless of the tenant's knowledge (see Pet. App. 166a), characterizing that general preservation of OHA's authority as "creat[ing] a rebuttable presumption that a tenant controls what occurs in his or her unit." *Id.* at 29a. In addition, without otherwise analyzing the question of who should bear the burden of proof, the court stated that "OHA remains free to proceed with evictions for off-premises drug activities when *it can prove* the tenant knew or should have known of the activity." Pet. App. 28a (emphasis added); see also *id.* at 29a & n.10.

b. Judge Sneed, joined by three other judges, dissented. Pet. App. 32a-67a. In his view, "[b]ecause the statute is clear on its face, HUD's interpretation is the only permissible construction." *Id.* at 33a. But he noted as well that "whether one accepts our contention that the statutory language is clear or the majority's argument that the language is silent, application of the *Chevron* test to the present controversy leads to the same conclusion." *Id.* at 33a-34a.

Judge Sneed concluded that other statutory provisions supported HUD's construction of the statute. In his view, for example, the fact that Congress included an express "innocent owner" defense in the forfeiture statute underscored

the significance of Congress's omission of any similar language in Section 1437d(*l*)(6). Pet. App. 42a-44a; see also *id.* at 40a-42a (analyzing 42 U.S.C. 1437d(c)(4)(A) (1994), discussed at pp. 31-32, *infra*).

Judge Sneed also disputed the majority's contention that Section 1437d(*l*)(6) would impose an "unreasonable" lease term, in violation of Section 1437d(*l*)(1), if it permitted eviction of tenants who were ignorant of the drug-related conduct. Pet. App. 49a-55a. He explained that "requir[ing] proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical" in any case in which the tenant was not found in the presence of the offender during the drug-related criminal activity, and that permitting eviction of such tenants gives the public housing authority "a credible deterrent against criminal activity." *Id.* at 51a. He also noted that "a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants," and that fact "attests to [its] reasonableness." *Id.* at 54a.

Finally, Judge Sneed concluded that Section 1437d(*l*)(6), without an "ignorant tenant" defense, is constitutional. Pet. App. 56a-64a. He explained that "[t]he failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny," because "Congress must draw distinctions 'in order to make allocations from a finite pool of resources.'" Pet. App. 60a (quoting *Lyng* v. *International Union, United Auto Workers of Am.*, 485 U.S. 360, 373 (1988)). In Section 1437d(*l*)(6), he reasoned, "Congress has limited the right to reside in public housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests." *Id.* at 58a. The provision thus "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a

credible deterrent against criminal activity." *Id.* at 61a. And "[b]ecause the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction." *Ibid.* For those reasons, Judge Sneed concluded, Section 1437d(*l*)(6) is constitutional.

SUMMARY OF ARGUMENT

Section 1437d(*l*)(6) requires public housing leases to provide that "any drug-related criminal activity * * * engaged in by * * * any member of the tenant's household * * * shall be cause for termination of tenancy." HUD has interpreted that provision to authorize (but not to require) public housing authorities to terminate the tenancy of tenants whose household members have engaged in drug-related criminal activity, without requiring proof that the tenants knew or should have known of that activity. HUD's construction of Section 1437d(*l*)(6) is not only reasonable, but is the only permissible construction of the statute. Accordingly, it is controlling in this case, and the court of appeals' holding that Section 1437d(*l*)(6) authorizes eviction only if the tenant knew or should have known of the drug-related criminal activity should be reversed.

I. The statutory language of Section 1437d(*l*)(6) unambiguously authorizes eviction without regard to tenants' knowledge of the drug-related activity of guests or other persons under their control. It contains no term that can be read to make the authority to evict turn on the tenant's state of mind or knowledge. To the contrary, Congress precluded reading artificial qualifications or restrictions into Section 1437d(*l*)(6) by providing for termination of tenancy based on "any" drug-related criminal activity committed by "any" household member or "any" guest or other person under the tenant's control.

The use of the term "under the tenant's control" does not support the court of appeals' restriction, for two reasons. As a matter of grammar that phrase applies only to "other person," not "any household member." Moreover, HUD has in any event consistently and authoritatively construed "under the tenant's control" to refer only to the tenant's control over the "other person's" access to the premises, not to require the likely unavailable proof that the tenant had control over the "other person's" specific conduct.

II. Other tools of statutory construction support HUD's interpretation. Congress amended the civil forfeiture statute (which already contained an "innocent owner" exception) to authorize forfeiture of leasehold interests in the same legislation in which it enacted Section 1437d(*l*)(6). Congress thus had civil forfeiture (with its innocent owner defense) in its sights when it enacted Section 1437d(*l*)(6). Its decision not to include any language in Section 1437d(*l*)(6) that is remotely similar to the express "innocent owner" forfeiture defense demonstrates that no such "unknowing tenant" exception was intended.

Two other paragraphs in Section 1437d(*l*)—one prohibiting "unreasonable" lease terms and the other permitting eviction only for "good cause"—were relied on by the court of appeals but provide no support for its conclusion. Congress's decision in Section 1437d(*l*)(6) to *require* inclusion of a lease term authorizing eviction of a tenant for a household member's drug-related criminal activity necessarily shows that Congress decided that such a term is *not* unreasonable and that a household member's participation in drug-related criminal activity is "good cause" for the tenant's eviction.

While the court of appeals' holding that Section 1437d(*l*)(6) precludes eviction of unknowing tenants disserves Congress's avowed goal of ridding public housing of the "reign of terror" caused by the presence of drug criminals, construing Section 1437d(*l*)(6) to permit termination of tenancy without regard to the tenant's knowledge substantially advances that declared purpose. Section 1437d(*l*)(6) gives the tenant maximum incentive to find out about and address drug-related criminal activity engaged in by household members

and others for whom the tenant is responsible. It avoids what would often be the insuperable enforcement problems that a PHA would face if the ability to remove a tenant turned on the PHA's ability to prove the tenant's knowledge of the drug-related criminal activity over the likely denials of knowledge by the tenant and the offender. It deters other potential drug criminals in public housing who are likely to become aware of the serious consequences of their activities and gives PHAs leverage to encourage tenants to bar drug criminals from their premises. Finally, because drug criminals pose a threat to their neighbors regardless of the tenant's knowledge of their activities, Section 1437d(*l*)(6) embodies the reasonable policy of authorizing PHAs to replace households who are the cause of that threat with some of the numerous households on public housing waiting lists who would not pose a similar threat.

The legislative history of Section 1437d(*l*)(6) supports HUD's construction. In 1990, when Congress rewrote Section 1437d(*l*)(6), Congress was informed that the statute as originally enacted did not contain a knowledge or other state-of-mind defense, yet Congress did not alter the relevant terms to include such a defense. Moreover, Congress broadened Section 1437d(*l*)(6) to cover more drug-related criminal activities in 1996, five years after HUD had authoritatively construed the statute not to provide such a state-of-mind defense and after several courts rendered decisions sustaining HUD's construction. Because Congress is presumed to have been aware of governing executive and judicial branch constructions, it is presumed to have adopted them when it broadened Section 1437d(*l*)(6) in 1996 without inserting any language that could suggest a state-of-mind defense.

The court of appeals purported to rely on the rule of constitutional avoidance to construe Section 1437d(*l*)(6) to include a knowledge requirement. That rule is inapplicable, however, because the terms of Section 1437d(*l*)(6) unambiguously preclude any such requirement. Moreover, Section 1437d(*l*)(6) poses no serious constitutional question. It is not a "penalty" provision, as the court of appeals suggested, but instead enforces what is a contractual warranty by the tenant that those for whom the tenant is responsible will not engage in drug-related criminal activities. Such terms are commonly enforced in similar contractual settings without any state-of-mind requirement. In addition, this Court held in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), that a State may constitutionally forfeit a private property interest to which it had no previous connection, without a showing of fault by the owner. That holding applies *a fortiori* here, where the government is seeking to enforce a contractual commitment regarding property it owns.

ARGUMENT

SECTION 1437d(*l*)(6) REQUIRES THAT A PUBLIC HOUSING AUTHORITY BE ENTITLED UNDER ITS LEASES TO TERMINATE A TENANCY BASED ON THE ILLEGAL DRUG ACTIVITY OF HOUSEHOLD MEMBERS OR GUESTS, WITHOUT REGARD TO THE TENANT'S KNOWLEDGE OF THAT ACTIVITY

This case turns on the meaning of 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999). The fundamental principles governing the interpretation of that statutory provision are not in dispute. As the court of appeals explained, "[t]he parties agree that in interpreting § 1437d(*l*)(6), [the court must] apply the framework set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Pet. App. 10a (alternate citation omitted). Under that framework, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. On the other hand, if Congress has not directly addressed the issue or has done so ambiguously, the

court may not "simply impose its own construction on the statute," but rather must determine whether the agency's construction is based on a permissible interpretation of the statute. *Id.* at 843.

Under *Chevron*, HUD's longstanding interpretation of Section 1437d(*l*)(6)—which requires that public housing leases provide for termination of the tenancy in the event of drug-related activities of a household member or guest, without regard to the tenant's knowledge of those activities—is clearly valid. That interpretation ensures that local public housing officials have the authority they need to assure the families who make their homes in public housing that they will have a safe, drug-free environment.

I. SECTION 1437d(*l*)(6) BY ITS TERMS REQUIRES THAT PUBLIC HOUSING AUTHORITIES HAVE DISCRETION TO TERMINATE TENANCY REGARDLESS OF THE TENANT'S KNOWLEDGE OF THE DRUG-RELATED CRIMINAL ACTIVITY

"[T]he starting point in a case involving construction * * * of a statute[] is the language of the statute itself." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, the lease clause required under the plain language of Section 1437d(*l*)(6) is violated when a household member engages in drug-related criminal activity, regardless of whether it can be shown that the tenant knew or had reason to know of that activity. Other provisions of the Housing Act confirm that reading. When the statute is read as a whole, that is the only conclusion that makes sense.[6]

A. The Plain Language Of Section 1437d(*l*)(6) Precludes A Knowledge Requirement As A Prerequisite For Eviction

In an effort to combat what it found to be a "reign of terror" imposed by drug dealers on public housing tenants, 42 U.S.C. 11901(3), Congress required in Section 1437d(*l*)(6) that public housing leases must provide that "any drug-related criminal activity on or off [the public-housing project's] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999). Under that explicit language, there is "cause for termination of tenancy" whenever "any drug-related criminal activity" has been committed by the tenant, "any member of the tenant's household, or any guest or other person under the tenant's control."

Even without regard to its repeated use of the term "any," Section 1437d(*l*)(6) contains no express or implied qualifications. If there has been drug-related criminal activity, and if that activity has been engaged in by a member of the tenant's household, it is a ground for termination of the tenancy and eviction. Had Congress intended to limit that consequence to only *some* criminal drug activities (such as those of which the tenant had knowledge), it surely would have said so. As HUD explained in promulgating the gov-

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[6] As noted in the petition for certiorari, most of the lower federal and state courts to have addressed the question have held that eviction does not depend on the tenant's knowledge of the criminal activity. See Pet. 22 n.9 (citing cases). Since that time, the Eleventh Circuit has also definitively taken that position, in direct conflict with the Ninth Circuit's holding in this case. See *Burton* v. *Tampa Hous. Auth.*, No. 00-13607, 2001 WL 1379724 (11th Cir. Nov. 7, 2001).

erning regulations shortly after Section 1437d(*l*)(6) was enacted, Congress made the determination that "[t]he tenant should not be excused from contractual responsibility [under the lease] by arguing that [the] tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." 56 Fed. Reg. 51,560, 51,567 (1991).

The use of the term "any" confirms the unqualified nature of the lease clause mandated by Section 1437d(*l*)(6). As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Accordingly, when Congress required the lease provision to vest PHAs with authority to terminate a tenancy for "*any* drug-related criminal activity" by one of the specified persons (tenant, household member, etc.), it intended it to apply "indiscriminately" to drug-related criminal activity "of whatever kind." See also *United States* v. *Monsanto*, 491 U.S. 600, 606-609 (1989). Congress's use of the term "any," and the otherwise unqualified text, thus renders the lease clause "comprehensive," "broad and unambiguous," *id* at 609, and precludes limiting the ground for eviction to only a subcategory of instances of drug-related criminal activities—*i.e.*, those that the tenant knew about, participated in, approved, or foresaw. See *Burton*, 2001 WL 1379724, at *2 ("HUD's interpretation is the only permissible construction of the statute.").

B. Section 1437d(*l*)(6) Does Not Require A Public Housing Authority To Seek Eviction For A Lease Violation, But Instead Vests It With Discretion Whether To Invoke The Lease Termination Clause

Section 1437d(*l*)(6) requires the lease provision to state that the specified drug activity is "cause for termination of tenancy," not that the public housing authority must invoke that clause and terminate the tenancy in all cases—or in any

particular case—of drug-related criminal activity. HUD has consistently made clear that "[t]he fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it." 66 Fed. Reg. 28,776, 28,782 (May 24, 2001). See also *id.* at 28,783 (PHAs "are neither required by law nor encouraged by HUD to terminate leaseholds in every circumstance in which the lease would give the PHA grounds to do so."); 56 Fed. Reg. at 51,567.

HUD regulations provide that, in deciding whether to terminate the tenancy, "the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action." 66 Fed. Reg. at 28,803 (to be codified at 24 C.F.R. 966.4(*l*)(5)(vii)(B)); accord 24 C.F.R. 966.4(*l*)(5)(i) (2000) (similar, now superseded); see also *Burton*, 2001 WL 1379724, at *6 (Section 1437d(*l*)(6) "does not mandate eviction for all tenants whose household members or guests engage in drug-related criminal activity, but rather it permits their eviction, granting discretion to the PHAs to make this determination on a case-by-case basis.").[7]

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[7] In the preamble to its recently promulgated regulations, HUD noted the distinction between "specifically authorized actions" and "mandatory actions." 66 Fed. Reg. at 28,777. HUD explained that "*[c]urrent illegal use of a drug*" and "[p]ast eviction for drug-related criminal activity" are "the subject of * * * *mandatory prohibition[s] on admission*" to public housing, while "[c]ertain other drug-related criminal activity is required by statute to be included in the lease as a *basis for eviction*." *Ibid.* (emphasis added). HUD's reference to "[c]urrent illegal use of a drug" refers not to Section 1437d(*l*)(6), but to 42 U.S.C. 13661(b)(1)(A) (Supp. V

In this very case, OHA voluntarily ceased its effort to evict tenant Rucker, presumably based on a consideration of the factors enumerated by HUD. See p. 8, *supra*. As Judge Sneed recognized, leaving discretion with the public housing authority makes sense, both because it gives tenants an incentive "to accept remedial actions short of eviction," Pet. App. 61a, and because the local public housing authority is in the best position to assess the seriousness of a drug problem at a given housing complex and the contribution to that problem made by a particular tenant, other household members, and other persons connected with the unit.

C. The Court Of Appeals Erred In Finding Ambiguity In The Text Of Section 1437d(*l*)(6) That Would Permit An "Unknowing Tenant" Defense

The court of appeals purported to find several ambiguities in the language of Section 1437d(*l*)(6). That language, however, is not ambiguous with respect to whether there is an "unknowing tenant" defense under Section 1437d(*l*)(6).

1. The court of appeals thought that Section 1437d(*l*)(6) is ambiguous because it "does not expressly address the level

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1999), which was enacted in 1998. See Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 576, 112 Stat. 2639. That provision requires HUD to "establish standards that prohibit admission to" public housing or federally assisted housing "for any household with a member * * * who the public housing agency or owner determines is illegally using a controlled substance." 42 U.S.C. 13661(b)(1)(A) (Supp. V 1999). A related provision, 42 U.S.C. 13662(a) (Supp. V 1999), requires the use of lease provisions that "allow the agency or owner [of federally assisted housing] * * * to terminate the tenancy or assistance for any household with a member * * * who the public housing agency * * * determines is illegally using a controlled substance." By requiring the use of lease provisions that "allow" the termination of the tenancy, Section 13662(a), like Section 1437d(*l*)(6), vests the landlord with discretion whether to seek eviction in each case. Section 13662(a) differs from Section 1437d(*l*)(6) in that it applies only to illegal drug *users*, while Section 1437d(*l*)(6) applies also to illegal drug *dealers*.

of personal knowledge or fault that is required for eviction." Pet. App. 12a. It is true that Section 1437d(*l*)(6) does not expressly address the tenant's level of personal knowledge, in the sense that it does not expressly condition eviction on any state of personal knowledge. That does not, however, lead to the conclusion that the language of Section 1437d(*l*)(6) is ambiguous on the point. Because Section 1437d(*l*)(6) applies without qualification in the event of "*any* drug-related criminal activity" by "*any* member of the tenant's household" or "*any* guest or other person under the tenant's control," the text of Section 1437d(*l*)(6) affirmatively precludes any such limitation. The fact that the mandatory lease clause reaches drug-related activity without regard to the tenant's knowledge, "even though it contains no express provisions to that effect, 'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.'" *Monsanto*, 491 U.S. at 609 (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).

The lease clause required by Section 1437d(*l*)(6) does not differ in this respect from clauses in many leases—or from other clauses in the very public housing leases at issue in this case. Leases frequently include provisions in which the tenant warrants to the landlord that certain conditions will be satisfied—whether regarding the tenant's behavior, the behavior of the tenant's visitors, the condition of the premises, or other factors. See, *e.g.*, *Minneapolis Public Hous. Auth.* v. *Lor*, 591 N.W.2d 700, 704 (Minn. 1999) ("[A] lease is a form of contract. Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.") (footnotes omitted); *Shepard* v. *Dye*, 242 P. 381 (Wash. 1926).

As with other contractual warranties, whether such clauses are breached does not typically turn on the reasons for the breach or the presence or absence of a particular mental state on the tenant's part. Indeed, the leases at issue in this case provide, for example, that the "[t]enant shall pay

such charges for the repair of those damages which are beyond normal wear and tear to the dwelling unit, development buildings, facilities or common areas and for the cleaning and extermination made necessary by the action(s) or neglect of the Tenant, members of the household or guests." J.A. 52.[8] See also J.A. 58-59, para. 9(k) (similar). The leases also provide that "Tenant is * * * responsible for causing members of the household and guests to comply with" a number of requirements, J.A. 57, para. 9, including "[t]o keep [the] dwelling unit and such other areas as may be assigned to the tenant * * * in a clean and safe condition," J.A. 58, para. 9(g), and "[t]o refrain from scattering rubbish, destroying, defacing, damaging or removing any part of the dwelling unit or development," J.A. 58, para. 9(j). None of those clauses requires a showing of knowledge or any other mental state on the part of the tenant. The lease clause required by Section 1437d(*l*)(6) operates in the same manner.

2. The court of appeals also found that Section 1437d(*l*)(6) "does not * * * make it clear who can be evicted"—"the offending party only, or all persons on the lease." Pet. App. 12a. That is incorrect. The term "termination of tenancy" means termination of the leasehold interest. A tenancy is "[t]he possession or occupancy of land *by right or title*, esp. under a lease." *Black's Law Dictionary* 1477 (7th ed. 1999) (emphasis added).[9] To terminate a tenancy is to terminate the lease.

The Ninth Circuit's statutory analysis is mistaken for another reason. Even if the words "tenant" and "tenancy" could somehow be considered ambiguous standing alone, the

[8] The lease of tenant Rucker is included in the Joint Appendix. The leases of the other tenants are in relevant respects identical.

[9] A "tenancy" may usefully be contrasted with an "occupancy," which is defined as "[t]he act, state or condition of holding, possessing, or *residing in* or on something." *Black's Law Dictionary* 1477 (7th ed. 1999) (emphasis added).

Ninth Circuit failed to accord due deference to HUD's regulatory definition of those terms. HUD's regulations make clear that "tenant" and "tenancy" mean "leaseholder" and "leasehold," and that a "tenancy" is held only by the person "who executed the lease with the PHA as lessee of the dwelling unit." See 24 C.F.R. 966.53(f) (1991). Continuously since 1975, HUD regulations have used the terms "tenant," "member of the tenant's household," "guest," and "other persons under the tenant's control" to distinguish between the leaseholder/tenant, on the one hand, and authorized occupants listed on the lease or nonoccupants for whom the leaseholder is legally responsible, on the other. See 40 Fed. Reg. 33,402 (1975), promulgating 24 C.F.R. 866.4(a)(1)-(2), 866.4(f)(9)-(11); 24 C.F.R. 966.4(a)(1)-(2), 966.4(f)(9)-(11) (1987); 24 C.F.R. 966.4(a)(1)-(2), 966.4(f)(9)-(11) (2000). See also 53 Fed. Reg. 33,245-33,246 (1988). The leases in this case use the term "tenant" in exactly that sense to refer to the leaseholder. See J.A. 49. The HUD regulations interpreting "tenancy" to mean "leasehold" are entitled to *Chevron* deference.

In addition, the Ninth Circuit's suggestion that Section 1437d(*l*)(6) leaves open the question of who may be evicted would make no sense whatever with respect to at least two of the four categories of enumerated persons—a "guest or other person under the tenant's control." A mere "guest" or "other person" has no "tenancy" in any conceivable sense of those words. Thus, if Section 1437d(*l*)(6) permitted "termination of tenancy" only of the "offending party," the statute would have no meaning at all when that "offending party" is a "guest or other person under the tenant's control." See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (a statute is read "with the assumption that Congress intended each of its terms to have meaning"). In short, "termination of tenancy" means termination of the leasehold interest, not simply a request that the offending party leave the premises.

3. Finally, the court of appeals suggested that the phrase "under the tenant's control" in Section 1437d(*l*)(6) could mean that the tenant must "exercise * * * a restraining or directing influence over" the conduct of the person who engages in the drug-related activity. Pet. App. 12a. Thus, the court continued, it might be "implicit from the use of this wording that Congress intended tenants to be held accountable for the actions of those persons who are subject to their control" only in that sense and not where, "for lack of knowledge or other reason," the tenant "could not realistically be expected to exercise control over the conduct of another." *Id.* at 12a-13a. Indeed, the court ultimately adopted that reading of the statute. See *id.* at 26a. The court's reading, however, is inconsistent with the text of Section 1437d(*l*)(6) for two reasons.

First, the phrase "under the tenant's control" does not apply in this case, which concerns drug-related criminal activities by members of the tenant's household. Section 1437d(*l*)(6) authorizes termination of the tenancy in the event of drug-related criminal activity "by a public housing tenant, any member of the tenant's household, *or* any guest *or* other person under the tenant's control" (emphasis added). The use of the disjunctive "or" before "guest" and again before "other person" means that the phrase "under the tenant's control" modifies only "other person" or, at most, "guest or other person." It cannot be read grammatically to modify each item on the list that precedes it. Cf. *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 79 (1990). In particular, "under the tenant's control" cannot be read to modify "household member."

Second, even if Section 1437d(*l*)(6) authorized termination of the tenancy only for drug-related criminal activity by "household members" who are "under the tenant's control," a "household member" by definition satisfies that condition. As HUD explained when it promulgated its recent amendments to the governing regulations, "the question is one of

legal control; by 'control,' the statute means control in the sense that the tenant has permitted access to the premises." 66 Fed. Reg. at 28,781. HUD has been consistent in that construction of "under the tenant's control" since the time it issued its first regulations implementing Section 1437d(*l*)(6) in 1991. See 56 Fed. Reg. at 51,562 ("The question * * * is whether the person in question was in the premises with consent of a household member at the time of the criminal activity in question."); cf. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (deference particularly appropriate for contemporaneous interpretation of statute by agency entrusted with its implementation). Thus, "household members" and "guests" are necessarily "under the tenant's control," within the meaning of Section 1437d(*l*)(6), because they have the permission or consent of the tenant (or a household member) to be present on public housing property. *Housing Auth. of New Orleans* v. *Green*, 657 So. 2d 552, 554-555 (Ct. App.) ("control" under Section 1437d(*l*)(6) is a matter of "access to the premises"), writ denied, 661 So. 2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996). The category of "other persons under the tenant's control" simply generalizes from "household members" and "guests" (who by definition are on public housing property premises with the tenant's or household member's consent) to others who are similarly present with the same consent.

II. OTHER PRINCIPLES OF STATUTORY CONSTRUCTION CONFIRM THAT SECTION 1437d(*l*)(6) APPLIES WITHOUT REGARD TO THE TENANT'S KNOWLEDGE

A. Related Statutory Provisions Confirm That Section 1437d(*l*)(6) Authorizes Termination Of The Tenancy Regardless Of The Tenant's Knowledge

Related statutory provisions confirm that Section 1437d(*l*)(6) authorizes termination of the tenancy without regard to the tenant's knowledge of the drug-related crimi-

nal activity. The provisions cited by the court of appeals (Pet. App. 13a-19a) in support of an "unknowing tenant" exception in fact demonstrate that Congress knew how to include language that expressly provides tenants with state-of-mind and other defenses when it believed that such defenses were appropriate. They therefore buttress the conclusion that Congress's decision to enact Section 1437d(*l*)(6) without such defenses was deliberate and should be honored.

1. Federal law authorizes civil forfeiture of "real property, including any right, title, and interest (*including any leasehold interest*) * * *, which is used * * * in any manner or part, to commit" a controlled substance offense. 21 U.S.C. 881(a)(7) (emphasis added). Federal law also, however, provides for a so-called "innocent owner" defense, 18 U.S.C. 983(d)(1) (2000), for "an owner who * * * did not know of the conduct giving rise to forfeiture." 18 U.S.C. 983(d)(2)(A)(i).[10] Congress easily could have included a similar defense in Section 1437d(*l*)(6) in 1988. Indeed, in the same Act in which Congress originally enacted Section 1437d(*l*)(6), it also amended the pre-existing civil forfeiture provision in 21 U.S.C. 881(a)(7) (Supp. V 1987)—which already contained an "innocent owner" defense—to include the explicit reference to "any leasehold interest" among forfeitable property. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 5101, 5105, 102 Stat. 4300, 4301. Congress therefore had both civil forfeiture and termination of tenancy for drug-related criminal activity in its sights when it enacted Section 1437d(*l*)(6). Yet it enacted Section

[10] At the time this case arose, the "innocent owner" defense was codified as part of 21 U.S.C. 881(a)(7) (1994), which provided that "no property shall be forfeited * * * by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." That provision was replaced in 2000 by the general "innocent owner" defense to civil forfeiture in 18 U.S.C. 983(d), discussed in the text. See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, §§ 2(a), 2(c), 114 Stat. 202, 210.

1437d(*l*)(6) without including anything comparable to the "innocent owner" defense that was in the civil forfeiture statute. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The Ninth Circuit expressed the view that the purpose of eviction from public housing and forfeiture of a lease "is the same"—"the tenant loses the leasehold interest"—and that Congress therefore must have meant for there to be an "innocent tenant" defense under Section 1437d(*l*)(6). Pet. App. 17a. That conclusion is mistaken.

As an initial matter, the inclusion of an express "innocent owner" defense in the civil forfeiture statute, which was enacted in 1984, see Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, § 306(a), 98 Stat. 2050, could not possibly establish what Congress intended four years later when it enacted the very different language of Section 1437d(*l*)(6) that contains no comparable provision for "innocent tenants." In any event, Section 1437d(*l*)(6) and civil forfeiture are very different mechanisms, such that Congress's decision to include an "innocent owner" defense in the latter but no "unknowing tenant" or "innocent tenant" defense in the former is entirely understandable. In seeking forfeiture of property, the government is acting solely in a law enforcement capacity, while in terminating a lease and seeking eviction of a tenant, the government is exercising its proprietary and contractual rights. Civil forfeiture is a mechanism by which the government may seize a private property interest to which it previously had no relationship at all; termination of a tenancy and eviction under Section 1437d(*l*)(6) is a mechanism by which the government takes back possession of property that it already owns when the leaseholder, by violating a term of the lease, has lost the contractual right to continued possession. And of course, 21 U.S.C. 881(a)(7) provides for forfeiture of a leasehold interest or other property *to the United States*, while Section 1437d(*l*)(6) provides for ter-

mination of the tenancy and reversion of possession to *the local public housing authority*.

Because of those differences, as well as the greater procedural protections associated with eviction, see Pet. App. 43a-44a (Sneed, J., dissenting), Congress reasonably determined that an "innocent owner" defense to civil forfeiture was appropriate, while no comparable defense is appropriate in terminating a tenancy. Section 1437d(*l*)(6) requires the tenant to warrant to the government when entering into the lease that neither the tenant, members of the tenant's household, guests, or other persons under the tenant's control will engage in drug-related activity. See *Burton*, 2001 WL 1379724, at *4-*5. What is important to the government (and to other tenants) about that warranty is that the tenant makes good on his promise to prevent the unit from being a haven for drug users and dealers, not that the tenant act with (or without) any particular knowledge or state of mind.

2. Two other provisions that were enacted at and around the time Congress enacted Section 1437d(*l*)(6) in 1988 and reworded it in 1990 further demonstrate that Congress knew how to mandate that consideration be given to a tenant's lack of knowledge of drug-related activity when it found it appropriate to do so. In both cases, Congress defined quite precisely the category of persons that were to be protected and the type of protection to be afforded. Like the forfeiture statute, these two provisions refute the court of appeals' notion that Congress intended to mandate an undefined "unknowing tenant" defense in Section 1437d(*l*)(6) entirely by implication.

a. Section 1437d(*l*)(6) was originally enacted in October 1988 as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4300. Eight months later, Congress included in a supplemental appropriations act a one-year provision (which has not since been renewed) that prevented a PHA from evicting, as a result of any person's "drug-related criminal activity * * *[,] any other household

member who [was] not involved in such activity," unless the latter was provided with an administrative grievance hearing prior to eviction. Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404, 103 Stat. 129. That provision accorded certain protection (though not a substantive defense to eviction) to tenants who were not personally involved in drug-related activity, so that they would not be summarily removed from the premises. In contrast to that one-year provision, Section 1437d(*l*)(6), which governs on a permanent basis, contains no similar language conferring any rights on such tenants.

b. Another provision, enacted in 1990 as Section 501 of the Cranston-Gonzalez Act, Pub. L. No. 101-625, 104 Stat. 4079, and codified at 42 U.S.C. 1437d(c)(4)(A)(iii)(1994), addressed priorities for admission of individuals to PHA housing. It directed that any individual or family evicted from public housing "by reason of drug-related criminal activity" must be denied a preference for readmission for three years, but created an exception that allowed a PHA to waive that restriction for any member of a family of an individual who was barred by the principal clause if the PHA determined that the family member "clearly did not participate in and had no knowledge of such criminal activity."[11] In enacting Section 501, Congress again specifically identified the special consideration it intended to allow in connection with drug-related criminal activity—*i.e.*, a waiver of the bar to readmission *following* eviction—and precisely defined the class of persons it intended to qualify for that special consideration. The court of appeals erred in

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[11] The provision quoted in the text was replaced in 1999 by 42 U.S.C. 13661(b)(2)(A) (Supp. V 1999), which, *inter alia*, generally "prohibit[s] * * * admission to federally assisted housing for any household with a member * * * who * * * is illegally using a controlled substance." See note 7, *supra*.

attempting to read a similar "unknowing tenant" exception into the unqualified language of Section 1437d(*l*)(6), which was revised and reenacted in Section 504 of the Cranston-Gonzalez Act and which governs the eviction (not subsequent readmission) of persons because of drug-related activities.[12] Indeed, Section 501 itself confirms that persons who did not participate in and had no knowledge of the criminal activity *are* subject to eviction.

3. The court of appeals believed that two other provisions of Section 1437d(*l*) support its view that an unknowing tenant cannot be evicted under Section 1437d(*l*)(6). Subsections (2) and (5) of Section 1437d(*l*) provide that PHAs "shall utilize leases which * * * do not contain unreasonable terms and conditions" and "which * * * require that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 U.S.C. 1437d(*l*)(2) and (5). The court of appeals stated that "reading section (*l*) as a 'harmonious whole' * * * requires us to presume that Congress also intended subsection (6) to be construed as a reasonable lease term and to permit eviction only if there is good cause." Pet. App. 13a-14a. The court recognized that the congressional "goal of providing safe and drug-free public housing is well served by * * * imposing a duty on tenants to take reasonable steps to control the drug or criminal activity of family members and guests or face eviction," but concluded that that goal would not be served by terminating the tenancy of tenants "who ha[ve] already

[12] The Ninth Circuit was "hesitant" even to address the significance of Section 501 because it is no longer part of the Act. Pet. App. 19a. The significance of the provision, however, lies not in its current status, but rather in the fact that, because it was enacted in the very same Act as Section 1437d(*l*)(6), it demonstrates the error in construing the very different and unqualified language of Section 1437d(*l*)(6) to contain an entirely unexpressed unknowing tenant defense.

taken all reasonable steps to prevent third-party drug activity." *Id.* at 14a.

The court of appeals' conclusion that subsections (2) and (5) of Section 1437d(*l*) impose substantive limits on the scope of subsection (6) is wrong. Subsection (6) has independent force under Section 1437d(*l*)(6), and it expressly provides, without qualification, that drug-related criminal activity by a household member or other specified person is "cause" for termination of the tenancy. But even reading the three subsections together, it is evident that, by requiring that a specified term concerning termination of the tenancy for drug-related activity be placed in a lease, subsection (6) embodies Congress's legislative determination that the required term is "reasonable" for purposes of subsection (2) and that violation of that term constitutes "good cause" for termination of the tenancy under subsection (5). Indeed, subsection (6) expressly states that a violation of its terms is "cause" for termination. As HUD explained in 1991, "Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause to evict)." 56 Fed. Reg. at 51,567. There is no basis for courts to second-guess that quite specific congressional judgment.

Furthermore, if there were any tension between subsections (2) and (5) on the one hand and subsection (6) on the other (but see pp. 34-37, *infra*, discussing subsection (6) as a reasonable response to the crisis caused by drug criminals in public housing), it must be resolved in favor of subsection (6). Subsections (2) and (5) address the general run of circumstances in which a public housing authority may evict a tenant. The more specific terms of subsection (6) address the more specific (and especially serious) situation involving drug-related criminal activity. "[I]t is a commonplace of statutory construction that the specific governs the general."

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); see also *Edmond* v. *United States*, 520 U.S. 651, 657 (1997); *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Accordingly, subsection (6) should not be artificially limited, even if a court were to perceive it to be in some tension with the court's own view of what would be "reasonable" and "good cause" under subsections (2) and (5) as a general matter.

B. Construing Section 1437d(*l*)(6) To Authorize Termination Of The Tenancy Without Regard To The Tenant's Knowledge Substantially Advances Congress's Declared Policy Of Eliminating Drug Criminals From Public Housing

Unlike the construction adopted by the court of appeals, construing Section 1437d(*l*)(6) in accordance with its terms to permit eviction without regard to the state of mind of the tenant substantially advances Congress's declared goal of ridding public housing of drug criminals. Section 1437d(*l*)(6) grew out of a crisis in public housing, amply documented in congressional hearing testimony. See pp. 37-40, *infra*. When it enacted Section 1437d(*l*)(6), Congress made specific findings that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related or violent crime," that "drug dealers are increasingly imposing a reign of terror on * * * low-income housing tenants," and that "the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures." 42 U.S.C. 11901 (1994 & Supp. V 1999). Congress's response to the drug-related "reign of terror" in public housing projects was to arm PHAs with greater authority to remove those tenants who it believed should be held accountable for the problem. That response directly addresses

the problem Congress identified, in at least four important ways:

First, "if household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity." 56 Fed. Reg. at 51,567. Imposing that kind of legal responsibility on a tenant regardless of the tenant's knowledge or ability to restrain the offender in a particular instance ensures that the tenant has the maximum incentive to find out whether household members or guests are engaging in drug-relating criminal activity, to warn them of the serious consequences of their activity, and to take whatever other steps are necessary to protect the security of the housing project. In other areas of the law, it is well-settled that "strict liability" of that sort serves the function of maximizing incentives to learn of dangers and avoid harmful conduct. See, *e.g.*, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 14 (1991) ("Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the [government's] goal."); *United States* v. *Park*, 421 U.S. 658, 670 (1975). Here, by giving greater incentives to a tenant whose knowledge or acquiescence in the drug-related criminal activity the PHA might later be unable to prove in court, Section 1437d(*l*)(6) helps rid public housing projects of the drug-related activities that deprive other residents of the safety and security to which they are entitled. By contrast, adding a knowledge requirement to Section 1437d(*l*)(6) would create a perverse incentive for tenants to remain ignorant of dangerous behavior by their household members and guests.

Second, a requirement that termination of the tenancy and eviction be limited to cases in which the tenant's knowledge could be demonstrated would pose enormous enforcement difficulties, which likely would be sufficient to render any such provision of very limited value in restoring peace and security to public housing projects. Aside from the rare case in which the tenant is caught in the immediate presence of a

household member or guest using or trafficking in drugs, a tenant threatened with eviction is likely to deny any knowledge of or ability to control drug-related criminal activity by others. Moreover, the household member or guest engaged in the drug-related activity is likely (if he does not invoke his Fifth Amendment privilege) to confirm the tenant's denials. See 56 Fed. Reg. at 51,567 ("[I]n practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent crime by a household member."); *Burton*, 2001 WL 1379724, at *6. Proving the knowledge of those who directly participate in criminal activity is difficult even for prosecutors who are armed with standard prosecutorial tools: the grand jury's subpoena power, the ability to induce co-conspirators to cooperate, and even the ability to conduct wiretaps and use other similar investigative techniques when appropriate. Public housing authorities have none of those tools. A rule under which eviction is possible only if the PHA can rebut the tenant's likely denials of knowledge would leave the PHA with insufficient ability to eliminate drug criminals—and those who harbor them—from the project.

Third, household-wide responsibility for drug-related criminal activity serves other worthwhile objectives. It has a significant general deterrent effect on the drug-related criminal conduct of other persons in public housing, when they become aware that their conduct may have adverse impacts on their entire household. Moreover, as Judge Sneed explained, if a PHA has the power to terminate a tenancy, it has the bargaining power to obtain an agreement by the tenant to bar the individual engaged in the drug-related criminal activity from the premises when the PHA and leaseholder agree that that is the optimal result. See also 56 Fed. Reg. at 51,567 ("If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit

occupant, and may seek to bar access by that person to the unit.").

Fourth, even if a tenant is genuinely unaware of the household member's drug-related criminal activity, termination of the tenancy may nonetheless be an effective (even if sometimes harsh) measure. Whether or not the tenant had knowledge of or acquiesced in the drug-related activity, the presence on public housing premises of household members or guests who engage in such conduct poses a threat to the tenant's neighbors—who are the truly "innocent tenants"—and to the general peace and security of the project. As HUD has noted, "a family which does not or cannot control drug crime * * * is a threat to other residents and the project." 56 Fed. Reg. at 51,567. The demand for public housing units regularly far outstrips the supply. In Section 1437d(*l*)(6), Congress reasonably determined that this scarce public resource should be allocated to individuals whose household members and guests do not pose a threat to their neighbors, rather than to those whose household members and guests, with or without the tenant's knowledge, threaten their security.

C. The Legislative History Supports HUD's Reading Of Section 1437d(*l*)(6)

Where the language of the statute is plain and unambiguous on its face, as it is here, resort to legislative history to contravene that language is inappropriate. See, *e.g.*, *Gonzales*, 520 U.S. at 6. An examination of the legislative history of Section 1437d(*l*)(6), however, in fact further confirms its meaning. Since its enactment in 1988, Section 1437d(*l*)(6) has been amended twice—in 1990 and 1996. Both times, Congress was on notice of the application of Section 1437d(*l*)(6) to tenants without proof of knowledge or other independent fault, and after 1991 it was on notice both of HUD's clear administrative construction of Section 1437d(*l*)(6) and of judicial decisions agreeing with HUD's

construction. Congress's failure to alter the basic, non-knowledge-based text of the provision in these circumstances reinforces HUD's interpretation of the provision.

1. As originally enacted in 1988, Section 1437d(*l*)(6) applied to "criminal activity, including drug-related criminal activity, on or near public housing premises," and it provided that "such criminal activity shall be cause for termination of tenancy." See p. 4, *supra*. It thus authorized termination of the tenancy without any suggestion that the tenant's knowledge was relevant—not only for "drug-related criminal activity"—but for "criminal activity" in general.

As a section-by-section analysis of the Anti-Drug Abuse Act introduced by its sponsor in the Senate explained, Section 1437d(*l*)(6) "codifie[d] current HUD guidelines granting public housing agencies authority to evict tenants if they, their families, or their guests engage in drug-related criminal activity." 134 Cong. Rec. 32,692, 33,186 (1988). The "guidelines" mentioned were HUD regulations that had been promulgated on August 30, 1988, as part of an extensive revision of HUD rules.[13] Section 1437d(*l*)(6) differed from the

[13] See 53 Fed. Reg. 33,216, 33,306 (1988) ("The lease shall provide that the Tenant and other members of the Household * * * [s]hall not engage in criminal activity in the dwelling unit or premises, and shall prevent criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members. * * * [T]he lease may provide that any of the following criminal activities by any Household member, on or off the premises, shall be a violation of the lease, or other good cause for termination of tenancy: (i) Any crime of physical violence to persons or property. (ii) Illegal use, sale or distribution of narcotics."). Shortly after both Houses of Congress had passed Section 1437d(*l*)(6) in October 1988, but before the President signed it on November 18, 1988, see 102 Stat. 4301, the entire package of HUD regulations was the subject of a temporary restraining order by a district court based on claims—unrelated to the substantive provisions quoted above—that the grievance provisions of the regulations would deny tenants certain procedural due process rights. *National Tenants Org.* v. *Pierce*, Civ. Action No. 88-3134 (D.D.C. Nov. 2, 1988). Section 1013 of the Stewart B. McKinney Homeless

HUD regulations in some respects, in particular by broadening the grounds for termination of the tenancy when guests or other non-household members were involved in the criminal activity. But Section 1437d(*l*)(6) specifically adopted the approach of the HUD regulations that had authorized housing authorities to provide that drug-related crimes committed "by any household member, on or off the premises, shall be a violation of the lease, or other good cause for termination of tenancy." See note 13, *supra*.

2. On July 20, 1989, a Senate Subcommittee held hearings on the drug problem in federally assisted housing. See *Drugs in Federally Assisted Housing: Hearings on S. 566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 1st Sess. (*Senate Hearing*). The American Civil Liberties Union submitted a statement that began by citing the recently enacted Section 1437d(*l*)(6). *Id.* at 76 n.2. The statement referred to the "problem * * * caused by the eviction of innocent family members." *Id.* at 77; see also *id.* at 86 ("First among our concerns is the plight of the innocent family member who might be evicted as a part of HUD's anti-drug crackdown."). The statement concluded that "PHAs should be restrained from imposing the sanction of eviction unless they can prove that a tenant had knowledge and actual control over the actions of a household member or third party." *Id.* at 90-91.[14]

Assistance Amendments Act of 1988, Pub. L. No. 100-628, 102 Stat. 3224, which was signed into law on November 7, 1988, expressly permitted the HUD regulations to go into effect on an interim basis but required that the notice-and-comment period be reopened. On January 25, 1989, the district court in *National Tenants Organization* nonetheless issued a preliminary injunction barring implementation of the HUD regulations. In response, HUD ultimately withdrew the regulations on February 10, 1989. 54 Fed. Reg. 6886.

[14] A representative of the ACLU also testified, referring to "the effect of the accelerated eviction procedure on innocent family members, persons

In 1990, aware of the application of Section 1437d(*l*)(6) to terminate the tenancy when a household member had engaged in criminal activity without a showing of knowledge or fault by the tenant, Congress amended Section 1437d(*l*)(6). The bill narrowed the category of prohibited *non*-drug criminal activity for which the tenant was to be held accountable to crimes that "threaten[] the health, safety, or right to peaceful enjoyment of the premises by other tenants." Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4185. The bill left unchanged, however, the general application of Section 1437d(*l*)(6) to "[a]ny" drug-related criminal activity by members of the tenant's household, or guests or other persons under the tenant's control.

3. In 1991, HUD adopted regulations implementing Section 1437d(*l*)(6). The preamble to the regulations, which has been extensively quoted above, see pp. 6-7, *supra*, made

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who themselves have not engaged in any criminal related activity, * * * but persons who would be subject to the severe sanction of being evicted from their apartment because they, too, happen to be residents in a unit that has been targeted for eviction." *Senate Hearing* 9. Other witnesses also testified about the policy of evicting tenants whose household members use drugs. See *id.* at 24 ("If you evict that youngster [who has been arrested for a drug offense], the entire family has to go out with them.") (testimony of Andres Garcia); *id.* at 25 ("[I]f an eviction policy is going to work it has to include the entire family.") (testimony of (now-Representative) James Moran, Mayor of Alexandria, Va.); *id.* at 44 ("My tenants are the ones that are saying throw out that family with the 18-year-old drug dealer.") (testimony of Richard Bowers, Jacksonville, Fla., housing official); *id.* at 48-49 (defense of policy of evicting the tenant without regard to knowledge by Mayor Moran). See also *Drugs in Public Housing: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. 18 (1989) (reference by Sen. Roth to household-wide eviction as "what the legislation adopted last year intended"); *id.* at 147, 149 (minority report discussing household-wide eviction policies in Omaha, Nebraska, and Wilmington, Delaware).

clear that HUD interpreted Section 1437d(*l*)(6) to permit termination of the tenancy regardless of the tenant's knowledge or fault. The preamble specifically noted that commenters had proposed "that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything 'reasonable' to control the criminal activity." 56 Fed. Reg. at 51,566. HUD rejected those proposals, on the ground that "Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction)." *Id.* at 51,567. The preamble to the regulations explained in detail the rationales for Congress's policy decision. See pp. 35-37, *supra*.

4. In 1996, Congress once again amended Section 1437d(*l*)(6). By that time, it had been five years since HUD had adopted its regulations. Two state appellate courts and the only federal court of appeals to address the issue had agreed with HUD's interpretation; only a single intermediate state appellate court had disagreed.[15] Nonetheless, Congress expanded, rather than contracted, the grounds for

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[15] See *Housing Auth. of New Orleans* v. *Green*, 657 So. 2d 552, 555 (Ct. App. 1995), writ denied, 661 So.2d 1355 (La.), cert. denied, 517 U.S. 1169 (1996); *City of San Francisco Hous. Auth.* v. *Guillory*, 49 Cal. Rptr. 2d 367, 372 (App. Dep't Super. Ct. 1995); *Chavez* v. *Housing Authority of El Paso*, 973 F.2d 1245, 1248 (5th Cir. 1992) (holding in case addressing non-drug crime provision of Section 1437d(*l*)(6) that "[t]he lease makes the tenant subject to eviction if any household member or guest conducts himself or herself in a manner inconsistent with the lease."). But see *Charlotte Hous. Auth.* v. *Patterson*, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995) (must be showing of tenant's fault in case involving violent crime by household member).

termination of the tenancy, by authorizing termination where the drug-related criminal activity took place "on or off"— rather than "on or near"—the public housing premises. That action is significant, because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see also *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 782 (1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982).[16]

5. The court of appeals relied on two passages in the Senate committee report that accompanied the 1990 amendment. Neither support its interpretation. The report stated:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990). The report also stated, in describing a parallel provision in the same bill concerning the Section 8 housing program, that "[t]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then

[16] Congress reaffirmed its support for the principle of household-wide responsibility in legislation passed in 1998. See note 7, *supra* (discussing 42 U.S.C. 13661(b) and 42 U.S.C. 13662(a) (Supp. V 1999), which, respectively, bar "any household with a member * * * who * * * is illegally using a controlled substance" from admission to public housing, and authorize PHAs "to terminate the tenancy for any household with a member * * * who * * * is illegally using a controlled substance").

good cause to evict the innocent family would not exist." *Id.* at 127.[17]

The passage in the committee report relied on by the court of appeals was discussing a Senate bill quite different from the one that was enacted. That bill would have imposed a considerably stricter standard of cause for eviction for drug-related crimes than Section 1437d(*l*)(6) (or the corresponding Section 8 provision, 42 U.S.C. 1437f(d)(1)(B)(iii)) as finally enacted. The Senate bill would have authorized termination of the tenancy only when the drug-related criminal activity "threatens the health or safety of, or right to quiet enjoyment of the premises by, other tenants." 136 Cong. Rec. 15,991, 16,012 (1990) (reproducing S. 566, 101st Cong., 2d Sess., §§ 521(f) and 714(a) (1990), as they passed the Senate). The Conference Report declined to accept that language from the Senate bill and instead adopted the unqualified language of Section 1437d(*l*)(6) concerning drug-related criminal activity. See H.R. Conf. Rep. No. 943, 101st Cong., 2d Sess. 418 (1990). Accordingly, the Senate Report is not a useful guide to congressional intent with regard to the meaning of Section 1437d(*l*)(6) as ultimately enacted.

Even if the Senate Report were a useful guide to congressional intent, however, the passages on which the court of appeals relied merely recognize that PHAs (or Section 8 housing owners) have discretion in deciding whether, if at all, to evict tenants who have violated the Section 1437d(*l*)(6) lease provision, and urge the importance of a wise use of that discretion. See S. Rep. No. 316, *supra*, at 127 (quoting 54 Fed. Reg. 15,998 (1989) (HUD statement of policy that decision whether to terminate tenancy under Section

[17] The Report preceded that comment with the recognition that "the ultimate decision to evict a family 'remains a matter for good judgment by the PHA * * * based on the factual situation. The statutory policy does not restrict the PHA's * * * exercise of wise and humane judgment.'" S. Rep. No. 316, *supra*, at 127.

1437d(*l*)(6) remains a matter for "wise and humane judgment" by PHA). It is significant that the Senate Report, in discussing the public housing provision, stated that eviction of a tenant who had no knowledge or control over the drug-related criminal activity would not be "appropriate," not that it would be unauthorized or illegal. Congress's recognition of the existence of such discretion confirms—rather than refutes—the proposition that Section 1437d(*l*)(6) does not impose an absolute rule that a tenant's lack of knowledge precludes termination of the tenancy. Cf. 54 Fed. Reg. at 15,998 ("On the other hand, the statute makes it clear that PHAs have *full authority* to initiate eviction for violation of the prohibition on criminal activity when they consider such action to be justified.") (emphasis added).

D. Construing Section 1437d(*l*)(6) According To Its Terms Does Not Lead To "Absurd Results"

The Ninth Circuit also relied on the premise that applying the statute as written would lead to "absurd results," which in the court's view included eviction of tenants who in fact could not keep their household member from committing drug offenses, whose household member committed drug offenses at a place far removed from the public housing project, or whose household member committed a drug offense years ago. Pet. App. 21a-22a. For the reasons given above, see pp. 35-37, *supra*, Section 1437d(*l*)(6) embodies Congress's reasonable policy judgments concerning the steps that have to be taken to rid public housing projects of the "reign of terror" caused by the presence of drug criminals. 42 U.S.C. 11901(3). Section 1437d(*l*)(6) "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." Pet. App. 61a (Sneed, J., dissenting). It therefore offers help and hope in combatting what Congress identified as a crisis situation, the foremost impact of which is on the truly innocent tenants in other

units of the same project whose households in no way contribute to the problem. The fact that the court could speculate about potentially harsh results in some isolated instances in which a PHA could invoke the lease clause in no way suggests that Section 1437d(*l*)(6) would lead to such "absurd results" that HUD's construction of the statute in accordance with its terms is impermissible. Cf. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574-576 (1982).

It should be emphasized as well that the results about which the court of appeals was concerned are unlikely to occur. A PHA would have little incentive, given its statutory mission, to evict a tenant who it believed is truly not culpable—at least if it would be harsh to do so—unless it concluded in the end that that course was justified by the other benefits that Section 1437d(*l*)(6) was intended to produce for the security of the housing complex and its tenants generally.

Insofar as the court of appeals was concerned that Section 1437d(*l*)(6) would authorize eviction where the drug-related criminal activity was undertaken far from home, it is not unreasonable to believe that persons who commit drug offenses far from home will also commit (or have committed) similar offenses nearby. And insofar as the court of appeals was concerned that a tenancy could be terminated because of a drug offense committed by a household member or guest in the distant past, that prospect is remote. Section 1437d(*l*)(6), as construed by HUD, permits eviction only for drug-related criminal activity that occurs during the period that the individual is a household member or guest. See 56 Fed. Reg. at 51,562 ("The question under the HUD rule is whether the person in question was in the premises with consent of a household member at the time of the criminal activity in question, not whether the person was a guest at some time in the past."). Section 1437d(*l*)(6) is a reasonable, even if potentially stringent, measure intended to fulfill Congress's commitment "to provide public and other federally assisted

low-income housing that is decent, safe, and free from illegal drugs." 42 U.S.C. 11901(1).

E. The Principle Of Constitutional Avoidance Has No Application Here Because The Meaning Of Section 1437d(*l*)(6) Is Clear And That Provision Is Constitutional

The Ninth Circuit erroneously relied on the principle of constitutional avoidance to reject HUD's construction of Section 1437d(*l*)(6). The court based its conclusion on the proposition that "[p]enalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause," and that "HUD's interpretation would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing." Pet. App. 24a. Those principles have no application here.

First, "the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1719 (2001). The text and purposes of Section 1437d(*l*)(6) are clear, and they are bolstered by the deference due to HUD's administrative construction of the statute. In that situation, the doctrine of constitutional avoidance gives no warrant to alter the statute's terms.

Second, "[s]tatutes should be interpreted to avoid *serious* constitutional doubts, * * * not to eliminate all possible contentions that the statute *might* be unconstitutional." *Reno* v. *Flores*, 507 U.S. 292, 314 n.9 (1993). Section 1437d(*l*)(6) does not raise a "serious" constitutional doubt. Contrary to the court of appeals' assumption, Section 1437d(*l*)(6) does not impose a penalty. Rather, it prescribes what is essentially a contractual warranty by the tenant that his household will not be the source of a potential hazard (the commission of drug-related criminal offenses or the harboring of persons who commit such offenses) to other tenants. The tenant is free to find other housing and thus not to make

that warranty. In that respect, the lease provision in this case is no different from numerous other ordinary lease provisions, the violation of which do not turn on a showing of intent or fault by the breaching party beyond the fact of the breach itself. This Court held in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), that a State constitutionally may forfeit an individual's interest in her own property to the State with no showing that she has engaged in any wrongdoing, intentional or otherwise. It follows *a fortiori* that a tenancy may be terminated for the tenant's failure to comply with a contractual provision to which she agreed in her lease, even if that failure was not independently blameworthy.

The court of appeals attempted to distinguish *Bennis* on the ground that the property here—unlike the automobile in *Bennis*—was not itself "used in connection with the crime." Pet. App. 25a. *Bennis* did not turn on that factor. Moreover, although this Court stated prior to *Bennis* that it had never had the "occasion to decide * * * whether it would comport with due process to forfeit the property of a truly innocent owner," *Austin* v. *United States*, 509 U.S. 602, 617 n.10 (1993), *Bennis* at least held that property could be forfeited even if the owner was "in no way . . . involved in the criminal enterprise" and "had no knowledge that its property was being used in connection with or in violation of" the law. 516 U.S. at 450 (citation omitted). Similarly, a tenant whose public housing premises are used as a haven by those who engage in drug-related criminal activity may not be directly "involved in the criminal enterprise" and may have "no knowledge" of that enterprise, but nonetheless, like the owner of the automobile in *Bennis*, may constitutionally be required to retain responsibility. The rationale for the *Bennis* rule is in large part that forfeitures have a "deterrent purpose distinct from any punitive purpose." *Id.* at 452. The same is true of Section 1437d(*l*)(6).

In any event, Section 1437d(*l*)(6) is constitutional because, as noted above, it provides for consensual lease clauses. This

Court has never suggested that the government may enforce a term of a government contract only upon a showing that the breaching party was at fault in some way beyond his having committed the breach itself. Even in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), in which the Court stated in dicta that "it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent," the Court carefully recognized that "privity or consent"—which here is supplied by the tenants' agreement to the lease term required by Section 1437d(*l*)(6)—would be sufficient to defeat any constitutional claim. Cf. *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (there exists no "constitutional * * * right of a tenant to occupy the real property of [a tenant's] landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement," and "[a]bsent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

F. Because HUD's Interpretation Of Section 1437d(*l*)(6) Is Reasonable, It Is Controlling If There Are Any Lingering Doubts

For the reasons given above, even if Section 1437d(*l*)(6) were ambiguous on the issue, HUD's interpretation of that provision in accordance with what is at least its most natural meaning and Congress's purposes must be upheld. See *Chevron*, 467 U.S. at 843. As noted above, HUD adopted its construction of the statute shortly after it was enacted, and it has consistently adhered to that construction. The court of appeals no doubt disagreed with Congress's weighing of the competing policies and, in particular, Congress's determination that the risk of the clause's invocation in particular harsh circumstances is outweighed by the need to empower PHAs to rid public housing projects of those whose tenancy

threatens the safety and security of their neighbors. But it is not the courts' place to second-guess Congress's policy judgments. See, *e.g.*, *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 479, 480 (1997) ("there is an important public policy dispute—with substantial arguments favoring each side," but "these are arguments best addressed to the Congress, not the courts"). Insofar as Congress left any ambiguity on the question, Congress assigned to HUD—not to the courts—the authority to resolve it. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."). Even if it is not compelled by Congress's clear intent, HUD's construction is certainly reasonable. Therefore, it must be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 13661 of Title 42 of the United States Code (Supp. V 1999) provides:

§ 13661. Screening of applicants for Federally assisted housing

(a) Ineligibility because of eviction for drug crimes

Any tenant evicted from federally assisted housing by reason of drug-related criminal activity (as such term is defined in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)) shall not be eligible for federally assisted housing during the 3-year period beginning on the date of such eviction, unless the evicted tenant successfully completes a rehabilitation program approved by the public housing agency (which shall include a waiver of this subsection if the circumstances leading to eviction no longer exist).

(b) Ineligibility of illegal drug users and alcohol abusers

(1) In general

Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing, as determined by the Secretary, shall establish standards that prohibit admission to the program or admission to federally assisted housing for any household with a member—

(A) who the public housing agency or owner determines is illegally using a controlled substance; or

(B) with respect to whom the public housing agency or owner determines that it has reasonable cause to believe that such household member's illegal use (or pattern of illegal use) of a controlled substance, or abuse (or

pattern of abuse) of alcohol, may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(2) Consideration of rehabilitation

In determining whether, pursuant to paragraph (1)(B), to deny admission to the program or federally assisted housing to any household based on a pattern of illegal use of a controlled substance or a pattern of abuse of alcohol by a household member, a public housing agency or an owner may consider whether such household member—

(A) has successfully completed a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable);

(B) has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable); or

(C) is participating in a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable).

(c) Authority to deny admission to criminal offenders

Except as provided in subsections (a) and (b) of this section and in addition to any other authority to screen applicants, in selecting among applicants for admission to the program or to federally assisted housing, if the public housing agency or owner of such housing (as applicable) determines that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in

any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees, the public housing agency or owner may—

(1) deny such applicant admission to the program or to federally assisted housing; and

(2) after the expiration of the reasonable period beginning upon such activity, require the applicant, as a condition of admission to the program or to federally assisted housing, to submit to the public housing agency or owner evidence sufficient (as the Secretary shall by regulation provide) to ensure that the individual or individuals in the applicant's household who engaged in criminal activity for which denial was made under paragraph (1) have not engaged in any criminal activity during such reasonable period.

2. Section 13662 of Title 42 of the United States Code (Supp. V 1999) provides:

§ 13662. Termination of tenancy and assistance for illegal drug users and alcohol abusers in Federally assisted housing

(a) In general

Notwithstanding any other provision of law, a public housing agency or an owner of federally assisted housing (as applicable), shall establish standards or lease provisions for continued assistance or occupancy in federally assisted housing that allow the agency or owner (as applicable) to terminate the tenancy or assistance for any household with a member—

(1) who the public housing agency or owner determines is illegally using a controlled substance; or

(2) whose illegal use (or pattern of illegal use) of a controlled substance, or whose abuse (or pattern of abuse) of alcohol, is determined by the public housing agency or owner to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(b) Consideration of rehabilitation

In determining whether, pursuant to subsection (a)(2), to terminate tenancy or assistance to any household based on a pattern of illegal use of a controlled substance or a pattern of abuse of alcohol by a household member, a public housing agency or an owner may consider whether such household member—

(1) has successfully completed a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable);

(2) has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable); or

(3) is participating in a supervised drug or alcohol rehabilitation program (as applicable) and is no longer engaging in the illegal use of a controlled substance or abuse of alcohol (as applicable).

3. Section 5.100 of Title 24 of the Code of Federal Regulations (promulgated by 66 Fed. Reg. 28,791 (May 24, 2001)) provides, in pertinent part:

§ 5.100 Definitions.

Covered person, for purposes of 24 CFR 5, subpart I, and parts 966 and 982, means a tenant, any member of the tenant's household, a guest or another person under the tenant's control.

Guest, only for purposes of 24 CFR part 5, subparts A and I, and parts 882, 960, 966, and 982, means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. The requirements of parts 966 and 982 apply to a guest as so defined.

* * * * *

Household, for purposes of 24 CFR part 5, subpart I, and parts, 960, 966, 882, and 982, means the family and PHA-approved live-in aide.

* * * * *

Other person under the tenant's control, for the purposes of the definition of covered person and for parts 5, 882, 966, and 982 means that the person, although not staying as a guest (as defined in this section) in the unit, is, or was at the time of the activity in question, on the premises (as premises is defined in this section) because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control.

4. Section 960.102 of Title 24 of the Code of Federal Regulations (promulgated by 66 Fed. Reg. 28,799 (May 24, 2001)) provides in pertinent part:

§ 960.102 Definitions.

(a) Definitions found elsewhere. (1) General definitions. The following terms are defined in part 5, subpart A of this title: * * * guest, household[.]

5. Section 966.4 of Title 24 of the Code of Federal Regulations (promulgated by 66 Fed. Reg. 28,799 (May 24, 2001)) provides in pertinent part:

§ 966.4 Lease requirements.

* * * * *

(d) Tenant's right to use and occupancy. (1) The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests. The term guest is defined in 24 CFR 5.100.

* * * * *

(f) Tenant's obligations. The lease shall provide that the tenant shall be obligated: * * *

(12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on or off the premises;

(ii) To assure that no other person under the tenant's control engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on the premises;

(iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

* * * * *

(l) * * *

(2) Grounds for termination of tenancy. The PHA may terminate the tenancy only for:

(i) Serious or repeated violation of material terms of the lease, such as the following:

(A) Failure to make payments due under the lease;

(B) Failure to fulfill household obligations, as described in paragraph (f) of this section;

* * * * *

(3) Lease termination notice. (i) The PHA must give written notice of lease termination of:

(A) 14 days in the case of failure to pay rent;

(B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days):

(1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or

(2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or

(3) If any member of the household has been convicted of a felony;

(C) 30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter period shall apply.

* * * * *

(5) PHA termination of tenancy for criminal activity or alcohol abuse.

(i) Evicting drug criminals. (A) Methamphetamine conviction. The PHA must immediately terminate the tenancy if the PHA determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.

(B) Drug crime on or off the premises. The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug

interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) Evicting other criminals. (A) Threat to other residents. The lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

(B) Fugitive felon or parole violator. The PHA may terminate the tenancy if a tenant is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime, or attempt to commit a crime, that is a felony under the laws of the place from which the individual flees, or that, in the case of the State of New Jersey, is a high misdemeanor; or violating a condition of probation or parole imposed under Federal or State law.

(iii) Eviction for criminal activity. (A) Evidence. The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

(B) Notice to Post Office. When a PHA evicts an individual or family for criminal activity, the PHA must notify the local post office serving the dwelling unit that the individual or family is no longer residing in the unit.

(iv) Use of criminal record. If the PHA seeks to terminate the tenancy for criminal activity as shown by

a criminal record, the PHA must notify the household of the proposed action to be based on the information and must provide the subject of the record and the tenant with a copy of the criminal record before a PHA grievance hearing or court trial concerning the termination of tenancy or eviction. The tenant must be given an opportunity to dispute the accuracy and relevance of that record in the grievance hearing or court trial.

(v) Cost of obtaining criminal record. The PHA may not pass along to the tenant the costs of a criminal records check.

(vi) Evicting alcohol abusers. The PHA must establish standards that allow termination of tenancy if the PHA determines that a household member has:

(A) Engaged in abuse or pattern of abuse of alcohol that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; or

(B) Furnished false or misleading information concerning illegal drug use, alcohol abuse, or rehabilitation of illegal drug users or alcohol abusers.

(vii) PHA action, generally. (A) Assessment under PHAS. Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they appropriately evict any public housing residents who engage in certain activity detrimental to the public housing community receive points. (See 24 CFR 902.43(a)(5).) This policy takes into account the importance of eviction of such residents to public housing communities and program integrity, and the demand for assisted housing by families who will adhere to lease responsibilities.

(B) Consideration of circumstances. In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

(C) Exclusion of culpable household member. The PHA may require a tenant to exclude a household member in order to continue to reside in the assisted unit, where that household member has participated in or been culpable for action or failure to act that warrants termination.

LDC

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In The

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

and

OAKLAND HOUSING AUTHORITY and HAROLD DAVIS,

Petitioners,

v.

PEARLIE RUCKER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE CASE

Petitioners' sweeping no defense, no due process interpretation of 42 U.S.C. § 1437d(*l*)(6) (1994 & Supp. V 1999) ("section 1437d(*l*)(6)") is a stark example of governmental agencies going "off the deep end" in their so-called war on drugs by arbitrarily inflicting ruinous collateral damage to the rights of innocent tenants who are themselves the innocent victims of the scourge of drugs.[1]

This case arises out of Petitioners' efforts to evict four such innocent victims. Respondents Pearlie Rucker, Willie Lee and Barbara Hill are elderly women caring for extended families of children and grandchildren. They have lived in public housing for many years, one of them for 30 years. Petitioners seek to evict Ms. Rucker because her mentally disabled daughter was allegedly found in possession of crack cocaine three blocks away from Ms. Rucker's apartment. Petitioners seek to evict Ms. Lee and Ms. Hill because their grandchildren were allegedly in possession of marijuana in the housing complex parking lot. None of these women is accused of any personal drug activity, and the undisputed evidence before the district court established that Ms. Rucker, Ms. Lee and Ms. Hill had absolutely no knowledge of the alleged drug activity and took affirmative steps to warn their households against drug use. Respondent Herman Walker is an elderly disabled man dependent for daily life on an in-home caregiver. Petitioners wanted to evict Mr. Walker because his caregiver allegedly possessed crack cocaine and invited guests with drugs into the housing complex. Like the other Respondents, Mr. Walker is not accused of personal drug

---

[1] In a 1989 lecture at the University of Georgia School of Law, a Justice of this Court warned against the erosion of individual rights in the war on drugs and expressed concern that "we have gone off the deep end a little to meet that crisis." *See* The Washington Post (April 9, 1989) (available at 1989 WL 2062157).

use and had no knowledge of the caregiver's alleged drug activity.

Petitioners contend that Congress intended to allow the eviction of innocent tenants like Respondents as part of the war on drugs. Specifically, Petitioners assert that, in enacting section 1437d(*l*)(6), which required the placement of anti-drug provisions in public housing leases, Congress expressly gave housing authorities unbridled discretion to deprive individuals and families of public housing without regard to the leaseholder's guilt or innocence. Petitioners also assert that the power to evict an innocent tenant is absolute, with no court empowered to review their exercise of discretion, no matter how arbitrary or inequitable.

The Ninth Circuit properly rejected Petitioners' extreme claims. The public housing and anti-drug legislation of which section 1437d(*l*)(6) is a part manifests Congress's intent that holders of public housing leases, just like private leaseholders, have a protected property interest that cannot be forfeited upon a showing of innocence by the tenant. It also makes manifest that Congress did not intend section 1437d(*l*)(6) to be an explicit or covert repeal of a tenant's due process and statutory right to retain a public housing lease when innocent of any wrongdoing.

SUMMARY OF ARGUMENT

• Nothing on the face of the statute supports Petitioners' claim that Congress intended to grant public housing authorities ("PHAs") the unfettered and unreviewable power to evict innocent tenants. Petitioners' argument, relying on the single word "any" as an unambiguous grant of unchecked power, would force the Court to find that Congress intended a statute with unlimited reach that encompassed patently absurd and unjust results that HUD itself has rejected.

• Applicable tools of statutory construction demonstrate that Congress intended to protect innocent tenants from being deprived of housing. Congress's statements confirm that section 1437d(*l*)(6) is subject to all applicable

due process and state law protections, including a defense of innocence.[2] Further, section 1437d(*l*)(6) and the lease forfeiture provisions in 21 U.S.C. § 881(a)(7) (2000) must be read consistently to provide an innocent tenant defense. Petitioners' policy contravenes the intent of Congress, as expressed through its statements and the statutory scheme as a whole, and is entitled to no deference.

• Under any standard, Petitioners' construction must be rejected because it undermines the purposes that Petitioners themselves proffer to justify the eviction of innocent tenants. By ignoring innocence and evicting despite a tenant's diligent efforts to discover and prevent drug activity, Petitioners' policy results in the removal of the very tenants who are willing to further Petitioners' interest in maintaining drug-free housing and virtually guarantees that tenants will never report the drug activity of household members or guests, for fear that they would be evicted along with the offender despite their innocence. Petitioners' exaggerated claim that an innocence defense will leave them powerless to deter drug activity is undercut by the availability of effective measures, recognized by HUD itself, that serve the goal of preventing drug activity without sacrificing the interests of innocent tenants.

• Under fundamental due process principles, terminating a public housing tenant's property right in his or her home based solely on association with an alleged wrongdoer and with complete disregard for the tenant's lack of culpability constitutes arbitrary and unconstitutional state action. Further, Petitioners' effort to deny Respondents and other innocent tenants any meaningful judicial review of eviction violates procedural due process protections.

---

[2] Throughout this brief, "innocent tenant defense" refers to circumstances showing that the tenant did not know of or have any reason to know of illegal drug activity, or took reasonable steps to prevent the activity from occurring.

- PHAs are state actors and may not evade applicable constitutional limitations when imposing conditions on the receipt of public benefits, whether through contractual terms or otherwise. In addition, basic principles of contract law and equity call into question enforcement of a private lease to evict an innocent tenant.
- Forfeiture of property is impermissible under both due process and Eighth Amendment principles when it is applied against an innocent owner whose property was not used in connection with any wrongdoing.
- Petitioners' policy ultimately sends a profoundly anti-family message by pressuring tenants to exclude family members from their homes to ensure that their only realistic source of housing is not lost through drug activity that occurs without the tenant's knowledge and despite preventive efforts.

ARGUMENT

I. WHEN ENACTING SECTION 1437d(*l*)(6), CONGRESS INTENDED TO PRESERVE A TENANT'S DUE PROCESS RIGHT TO RAISE AN INNOCENT TENANT DEFENSE TO ANY EVICTION PROCEEDING.

A. Introduction.

Respondents agree that *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and related decisions frame the analysis in this case. Under familiar principles, this Court determines first "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's construction must be "rational and consistent with the statute." *NLRB v. United Food and Commercial Workers Union,*

484 U.S. 112, 123 (1987); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). In the end, the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 476 U.S. at 843 n.9.

To determine whether Congress has spoken on the question at issue, the Court "should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132. Rather, " 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' " *Id.* at 133 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). This Court must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Id.* (quotations and citations omitted). This rule applies with particular force to statutes that are *in pari materia* like section 1437d(*l*)(6) and the closely related forfeiture provisions in 21 U.S.C. section 881(a)(7) ("section 881(a)(7)"). Statutes "enacted by the same legislative body at the same time" and "intended to serve the same function" should be harmonized and interpreted as if they were one law. *Erlenbaugh v. United States*, 409 U.S. 239, 244-45 (1972).

These principles firmly support the Ninth Circuit's conclusion that "Congress has spoken on the issue and that HUD's interpretation is contrary to congressional intent." HUD Pet. App. at 10a. Section 1437d(*l*)(6), when properly viewed through the lens of Congress's actions and the section's place in the overall framework of anti-drug legislation, is intended to protect innocent children, parents, grandparents and other tenants from the actions of overzealous governmental entities seeking to deprive them of public housing, without which they would be homeless. HUD's contrary interpretation in the face of this congressional intent is unreasonable and impermissible, and should be rejected.

B. Section 1437d(*l*)(6) And Section 881(a)(7) Embody Congress's Comprehensive Strategy For Dealing With Drug Activities In Public Housing.

The statutory framework surrounding HUD's actions is straightforward. The United States Housing Act, 42 U.S.C. §§ 1437, *et seq.* (2000) ("Housing Act"), sets out a comprehensive program to provide housing to the nation's poorest families and citizens. The Housing Act establishes local public housing authorities chartered under state law to administer housing programs. *Id.* at § 1437a(b)(6).

Congress originally addressed drug activity in public housing in the Anti-Drug Abuse Act of 1988 ("Anti-Drug Abuse Act") at Subtitle C, entitled "Preventing Drug Abuse in Public Housing." Pub. L. No. 100-690, § 5101 *et seq.*, 102 Stat. 4181, 4300-4301. This Subtitle implemented a comprehensive strategy against drug activity built on two key statutory components: sections 5101 and 5105. In section 5101, Congress enacted the original version of section 1437d(*l*)(6), on which Petitioners now rely in seeking to evict tenants personally innocent of any drug activity. Section 5101 instructed PHAs to add to public housing leases a clause providing that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

Pub. L. 100-690, § 5101, 102 Stat. at 4300, codified at 42 U.S.C.A. § 1437d(*l*)(5) (1990).[3]

---

[3] Section 5101 defined "drug-related criminal activity" to mean "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell distribute, or use, of a controlled substance" under the Controlled Substances Act, 21 U.S.C. § 802. Pub. L. 100-690, § 5101, 102 Stat. at 4300.

At the time this legislation was being considered and adopted, the Housing Act imposed an extensive set of due process requirements obligating each PHA to "provide formal grievance procedures for the resolution of tenant disputes with the PHA arising out of their lease or PHA regulations." *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 426 (1987). These procedures, codified at 42 U.S.C. § 1437d(k), "include informal and formal hearings and administrative appeals, conducted within each PHA by impartial decisionmakers, to consider adverse decisions taken against tenants by the PHA." *Id.* Congress required that these minimum administrative due process protections be met before a PHA could seek an eviction, permitting them to be omitted only if the Secretary of HUD determined that the PHA's jurisdiction afforded tenants a court hearing with basic due process elements before eviction. 42 U.S.C.A. § 1437d(k) (1990).

As the second component of Congress's attack on drug activity in public housing, Congress created another mechanism whereby a governmental entity could terminate a public housing tenancy based on violations of drug laws. Section 5105 amended the forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 881(a)(7), to include "any leasehold interest" in the categories of real property interests subject to forfeiture when "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of [the Controlled Substances Act] punishable by more than one year's imprisonment." Pub. L. 100-690, § 5105, 102 Stat. at 4301, codified at 21 U.S.C.A. § 881(a)(7) (1990). As the placement of section 5105 in Subtitle C makes clear, Congress specifically intended to apply federal civil forfeiture law to include public housing leases, as well as leases in the private sector. *See, e.g.*, 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (remarks of Senator Biden, a sponsor of the Anti-Drug Abuse Act, noting that section 5105 "allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing

leases are considered property with respect to civil forfeiture laws") (available at 1988 WL 182529); *see also U.S. v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1025-26 (E.D.N.Y. 1991) (recognizing application of section 881(a)(7) to terminate public housing leases).[4]

C. Section 1437d(*l*)(6) On Its Face Does Not Support The Grant Of Absolute Power To A Public Housing Authority To Evict An Innocent Tenant.

HUD seeks to evade the Ninth Circuit's holding by asserting that the "plain language of Section 1437d(*l*)(6) unambiguously authorizes eviction" of innocent tenants. HUD Br. at 14. HUD places the full weight of its "plain language" argument on Congress's use of the word "any" in section 1437d(*l*)(6). *Id.* at 19-20. In HUD's view, "any" means "indiscriminately," and Congress's use of this single adjective not only purportedly communicates an unambiguous intent to permit indiscriminate and arbitrary evictions of public housing tenants, but also affirmatively expresses Congress's intent to deprive a public housing tenant of any meaningful due process protections in seeking to avoid an eviction. *Id.* at 20.

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[4] HUD itself has acknowledged that section 5105 specifically applied federal forfeiture law to the revocation of public housing leases. *See Termination of Public Housing Tenancy for Drug-Related Criminal Activity*, 54 Fed. Reg 15,998 (April 20, 1989) (advising PHAs about the Anti-Drug Abuse Act and noting the availability of lease forfeiture under section 881(a)(7)); *121 Nostrand Avenue*, 760 F. Supp. at 1026 (noting formation of joint HUD-Department of Justice Public Housing Asset Forfeiture project to pursue public housing lease forfeitures under section 881(a)(7)). Indeed, in 1990, HUD Secretary Jack Kemp announced the launch of a coordinated strike in 23 cities to seize tenants' leases under the forfeiture provisions. *See* Stephanie Saul, *Activists Attempt to Halt HUD Eviction Program*, Newsday (June 16, 1990) (available at 1990 WL 3341537).

Respondents submit that the Ninth Circuit was right when it said: "The text of subsection (6), viewed in isolation, does not compel either party's interpretation." HUD Pet. App. at 13a. Petitioners' position finds no support in the isolated text of the statute, even if one were to read "any" as used in section 1437d(*l*)(6) literally. The section on its face merely directs that certain language be included in all public housing leases. It does not purport to mandate eviction, nor can it fairly be argued that it manifests an intent by Congress to deprive the tenant of his or her due process protections, including an innocent owner defense, in any eviction proceedings.

In making this "plain language" argument, HUD places great reliance on language found in *United States v. Monsanto*, 491 U.S. 600 (1989), and *United States v. Gonzales*, 520 U.S. 1 (1997). Neither case supports the position that HUD asks this Court to adopt. In *Monsanto*, the Court rejected the attempt by Monsanto to carve out an exception to the forfeiture of "all assets" to protect assets to be used to pay attorney's fees. In this case, Respondents are not seeking to carve out any exception to the language of section 1437d(*l*)(6); rather they assert that section 1437d(*l*)(6) does not address, nor purport to address, the due process protections that Congress intended to be applicable to any attempt to evict innocent tenants. In *Gonzales*, the Court held that reading the phrase "any other imprisonment" literally avoided a conflict with other federal statutes, avoided the absurd result found to exist by the Court of Appeals and was consistent with the internal language of the section itself. *Gonzales*, 520 U.S. at 5-9. None of these facts exist in this case. In fact, if the Court were to adopt the position urged by Petitioners, section 1437d(*l*)(6) would be inconsistent with Congress's intent as expressed in other statutes and legislative history and it would create the possibility of odd and absurd results.

Persuasive evidence is found in HUD's own actions that HUD does not really believe its "plain meaning"

interpretation is consistent with Congress's intent. If section 1437d(*l*)(6) is a mandate from Congress to HUD to have PHAs evict any tenant, regardless of innocence, from public housing units where there is a violation of a drug law by a household member, guest or other person over whom the tenant has control, where does HUD find the authority to advise PHAs that they can use discretion in applying this mandate? Where in this mandate does HUD find the direction from Congress to act "humanely"? In fact, HUD admits that nothing in section 1437d(*l*)(6) mandates eviction or addresses the procedures under which it should be conducted. HUD Br. at 20-22. Further conduct by HUD that belies its "plain meaning" interpretation is its post-hoc construction of section 1437d(*l*)(6). *See* HUD Br. at 45 (HUD "permits evictions only for drug-related criminal activity that occurs during the period that the individual is a household member or guest."). In the same vein, HUD recently "clarified" that drug possession or activity by a "commercial visitor" making a delivery would not support eviction in the absence of any other relationship with the tenant. *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28,776 at 28,782 (May 24, 2001).[5] These provisions reflect a clear understanding that Congress did not, in fact, mean "any" literally to exclude all defenses of innocence, as HUD now contends.

Also persuasive in rejecting Petitioner's "plain meaning" arguments are the absurd results that would arise if the Court were to accept HUD's reading of the word "any" and the unbridled power that would be conveyed thereby. *See Lewis v. United States*, 523 U.S. 155, 160 (1998) (rejecting literal meaning of "any"); *United States v. X-Citement Video,*

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[5] This change undoubtedly responded to concerns like the one expressed by the Supreme Court of Tennessee that HUD's interpretation would support the "absurd result" of permitting a PHA to evict a family when a "salesman or pizza delivery person enters a public housing tenant's apartment in possession of drugs." *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504, 512 (2001).

Inc., 513 U.S. 64, 69-70 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd. . . . We do not assume that Congress, in passing laws, intended such results."). Illustrative of the potential for such absurd results are HUD's own statements that section 1437d(*l*)(6) would allow a PHA to evict "an entire family" if a tenant's child was caught smoking marijuana 3,000 miles away, HUD Pet. App. at 22a, or that eviction of an innocent tenant would be permissible "if a household member had been convicted of a drug crime years earlier." *Id.* While HUD tries to dismiss these results as overheated and irrelevant hypotheticals, they are HUD's own statements of the purported powers of the PHAs under Petitioners' interpretation of section 1437d(*l*)(6). HUD suggests no way by which an innocent tenant could be protected against such arbitrary and capricious application of its interpretation of the lease provision by a PHA other than to suggest that PHAs act "humanely." As this case amply demonstrates, this is a rotten reed upon which to rely to prevent the eviction of an innocent tenant.

In addition to being without support, Petitioners' "plain meaning" arguments would have this Court ignore basic principles of statutory construction. To determine whether Congress has decided a disputed issue, "the reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id.* at 132-33. As the Ninth Circuit properly concluded, the text of section 1437d(*l*)(6) "viewed in isolation" does not compel a particular conclusion about Congress's intended treatment of innocent tenants. HUD Pet. App. at 13a. Consequently, Congress's intent in section 1437d(*l*)(6) emerges not from a myopic analysis of isolated definitional possibilities in the word "any" but

from section 1437d(*l*)(6)'s legislative history and its place in the overall statutory scheme.[6]

D. Well Settled Principles Of Statutory Construction Demonstrate Congress's Intent To Allow A Tenant To Present An Innocent Tenant Defense To Any Threatened Eviction By A Public Housing Authority.

HUD finds it necessary to torture the word "any" into a non-existent clarity because the other tools of statutory construction strongly support the Ninth Circuit's decision. It was Congress's intent to protect tenants from the arbitrary and capricious enforcement of the provision of the lease contained in section 1437d(*l*)(6), including the right of innocent tenants to establish their innocence as a defense to the eviction action. Consequently, HUD's

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[6] Petitioners' insistence that section 1437d(*l*)(6) is crystal clear in its meaning also founders on its divided treatment in the courts. In this case alone, eight circuit judges and one district court judge found that Congress did not intend to authorize the eviction of innocent tenants. Courts in Pennsylvania and North Carolina have reached the same conclusion. *See Delaware County Housing Authority v. Bishop*, 749 A.2d 997 (Pa. Comm. Ct. 2000); *Charlotte Housing Authority v. Patterson*, 464 S.E.2d 68 (1995). The Tennessee Supreme Court also found that Congress did not authorize the eviction of innocent tenants in the context of drug activity by guests or other non-household members. *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504 (2001). When combined with Petitioners' list of decisions purportedly supporting HUD's interpretation, see HUD Br. at 41 n.15, the conclusion unavoidably follows that the interpretation of the statute is, at a minimum, highly unsettled. While HUD apparently attributes the sharp division in national judicial opinion to politics, the less cynical and more persuasive explanation is that section 1437d(*l*)(6) simply does not provide the "plain language" mandate HUD claims.

contrary interpretation of section 1437d(*l*)(6) is neither reasonable nor permissible.

Congress established in Subtitle C of the Anti-Drug Abuse Act a unitary scheme to address drug activity in public housing. Sections 5101 and 5105 share not only a common origin and overlapping application to the same public housing population, they also manifest, when properly analyzed, that Congress had no intent to prevent innocent tenants from asserting that defense against any threatened eviction. Neither HUD nor OHA points to any language in section 1437d(*l*)(6) that mandates such a result; neither HUD nor OHA points to any language in any legislative history that supports such a result. In fact, it is all to the contrary.

Just one year after enacting the Anti-Drug Abuse Act, Congress passed new legislation reflecting its recognition of due process rights of an innocent tenant. In 1989, Congress directed the Secretary of HUD to "review the drug-related eviction procedures of all jurisdictions having a [PHA]" to determine "whether such procedures meet Federal due process standards." Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, § 404(a), 103 Stat. 97, 128. If the Secretary concluded that a jurisdiction satisfied these standards, the grievance procedures mandated in section 1437d(k) would be superfluous and the Secretary could waive the requirement that a PHA follow them. Significantly, in permitting the Secretary to waive due process protections applicable under the Housing Act to drug-related evictions where local courts provided adequate procedural guarantees, Congress expressly stated that "evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy." Pub. L. 101-45, § 404(b), 103 Stat. at 129.

In 1990, Congress made applicable the eviction provisions of the Anti-Drug Abuse Act to Section 8 subsidized housing under the Housing Act. Again, Congress stated

that PHAs in jurisdictions providing tenants with adequate due process protections in a court hearing "prior to eviction" could be relieved of the due process obligations imposed by section 1437d(k) in cases involving alleged drug activity. Cranston-Gonzales National Affordable Housing Act of 1990 ("Affordable Housing Act"), Pub. L. 101-625, §§ 503(a), 546, 104 Stat. 4079 at 4184, 4220.

Congressional reports associated with the Affordable Housing Act strongly affirmed that Congress not only had no intention of abandoning the traditional notions of fairness and due process while pursuing its war on those who were victimizing innocent public housing tenants, but also that Congress deemed a tenant's lack of culpability to be a defense against any attempt to evict. In comments on the Act's application to Section 8 housing, the Senate Report of the Banking, Housing and Urban Affairs Committee unambiguously stated "the Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exit [sic]." S. Rep 101-316, at 127 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5889. In additional comments on a bill proposing modifications to the Act that ultimately were not adopted, the Senate Report again underscored that "eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity." *Id.* at 179, 1990 U.S.C.C.A.N. at 5941. Although made in relation to additional statutory language that was ultimately not included, the statement relates specifically to the scope of the housing authorities' discretion when seeking to evict innocent tenants, and it is directly relevant to the issue before this Court.

Significantly, no contrary evidence exists in Congress's deliberations. As the District Court found, Petitioners "cannot identify anything in the legislative history that unambiguously indicates that Congress specifically intended that a public housing authority may terminate a tenant's lease for drug-related criminal activity of someone

else even when the tenant had no knowledge, or no reason to know, of the criminal activity and no ability to control the person for whom HUD wants to hold the tenant responsible." HUD Pet. App. at 151a.

The complementary development of section 5105 further underscores that Congress was not prepared to sacrifice an innocent tenant's right to due process protections against wrongful eviction merely because the housing authorities wanted to use the threat of the loss of the lease as a weapon in its war on drugs. As section 881(a)(7) stated at the time Congress added leasehold interests, "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *See* 21 U.S.C. § 881(a)(7) (Supp. V 1987). By adding public housing leases to the purview of the forfeiture provisions of section 881(a)(7), Congress made clear its intent that holders of public housing leases, as well as private leaseholders, have a protected property interest that could not be forfeited upon a showing of innocence by the tenant. Court decisions applying this defense have barred termination of public housing tenancy when a tenant demonstrates she had no knowledge of drug activity and was not willfully blind to the existence of such activity. *See 121 Nostrand Ave.*, 760 F. Supp. at 1032-33.

Congress recently broadened the civil forfeiture law to provide tenants even more protections by moving and expanding section 881(a)'s protections into new forfeiture legislation. *See* Civil Asset Forfeiture Reform Act of 2000 ("Reform Act"), Pub. L. 106-185, 114 Stat. 202, codified at 18 U.S.C. §§ 983, *et seq.* (2000). The Reform Act substantially expanded the protections afforded to innocent public housing tenants and other property holders against property loss for drug activity. "Believing that a meaningful innocent owner defense is required by fundamental fairness," and seeking "to make that defense uniform" in all property revocation cases, H.R. Rep. No. 106-192, at 11-15 (1999) (available at 1999 WL 406892), Congress enacted an extensive

system of judicial procedures to guarantee that property is revoked only from culpable wrongdoers. The centerpiece of these procedures is Congress's mandate that an "innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." 18 U.S.C. § 983(d)(1). An "innocent owner" is an owner who "did not know of the conduct giving rise to the forfeiture." *Id.* at § 983(d)(2)(A)(i).[7]

Congress also acknowledged the special importance of protecting real property and, in particular, a person's home. Where forfeiture involves an interest in real property, the government may not seize the property without providing prior notice to the affected parties and obtaining a judicial order authorizing forfeiture. *Id.* at § 985. Further, when the property interest subject to forfeiture would result in the loss of a primary residence by indigent owners, Congress took the extraordinary step of guaranteeing free legal representation in civil forfeiture proceedings by a Legal Services Corporation attorney. *Id.* at § 983(b)(2)(A). In addition, Congress implemented procedures for claimants to challenge loss of property as constitutionally excessive under the Eighth Amendment. *Id.* at § 983(g).

Thus, Congress created section 1437d(*l*)(6) in the same Subtitle in which it expressly provided an innocent owner defense for public housing tenants by amending section 881(a)(7) to include public housing leases. Under familiar standards of *in pari materia* construction, it reasonably follows that Congress understood the same innocent owner defense to apply to all public housing tenants when confronted by the threatened loss of their leasehold interests. When two statutes serve, as here, the same function and result – elimination of drug use in public housing by imposing as punishment the loss of a leasehold interest by

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[7] The owner of the property interest subject to forfeiture bears the burden of proving innocence by a preponderance of the evidence. *Id.* at § 983(d)(1). The government's burden of proof is also a preponderance of the evidence standard. *Id.* at § 983(c).

reason of drug-related activities – "sensible construction" requires that they be treated as one law with consistent application. *Erlenbaugh*, 409 U.S. at 244-45; *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000) (using Program Fraud Civil Remedies Act of 1986 ("PFCRA") to define term in False Claims Act ("FCA") because "the PFCRA was designed to operate in tandem with the FCA" and was "not only . . . enacted at virtually the same time as the FCA was amended . . . but its scope is virtually identical to that of the FCA.").[8] The meaning of one statute is particularly affected by related acts where Congress has spoken "more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133.

The need to reconcile statutes *in pari materia* is especially appropriate in this case. Unless the application of section 1437d(*l*)(6) is subject to due process protections comparable to those expressed in section 881(a)(7), the protection provided in section 881(a)(7) would become meaningless and easily avoided. The federal government, rather than going through the forfeiture procedures when seeking to punish for drug-related activities, would get the PHA to exercise what HUD asserts is the PHA's unfettered power to evict the innocent as well as the guilty. It could not have been Congress's intent to have added public housing leases to the forfeiture statute, with its attendant due process protections and, at the same time, provide in

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[8] *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible.") (quotations omitted) (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

section 1437d(*l*)(6) a means for circumventing those due process protections. *See United States v. Phommachanh*, 91 F.3d 1383, 1387 (10th Cir. 1996) (rejecting judicial deportations under 18 U.S.C. § 3583(d) because they would result in "illogical set" of rules allowing circumvention of procedural safeguards under closely related deportation statute at 18 U.S.C. § 1251 and would render other deportation sections meaningless); *United States v. Xiang*, 77 F.3d 771, 773 (4th Cir. 1996) (same); *see also Vermont Agency of Natural Res.*, 529 U.S. at 786 (noting "[i]t would be most peculiar" to permit substantial penalties under one statute but bar them under a closely related statute).

E. HUD's Attempt To Glean Congressional Intention From Congressional Inaction Or Other Statutory Analysis Should Be Rejected.

1. Negative Implication Is Inapplicable.

HUD argues that the fact that the innocent owner defense in section 881(a)(7) is not repeated in section 1437d(*l*)(6) indicates that Congress affirmatively intended to bar the defense in state eviction actions for alleged violations of section 1437d(*l*)(6). HUD Br. at 15, 28-30. This argument is without merit. Putting aside the fact that "negative implication" is a questionable basis for divining congressional intent, *see United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) ("Congress cannot express its will by a *failure* to legislate.") (Scalia, J. concurring in part and in the judgment) (emphasis in original); 2B Sutherland, Statutory Construction, § 49:10 at 112-14 (6th ed. 2000) ("Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute"), the argument must fail because of the irrational conflict that is created in two statutory provisions that are identical in purpose and result (*see* above and Section I.E.4 below). It also runs directly contrary to the imperative that this Court construe statutes as a " 'harmonious whole' " and "guided to a degree by common sense." *Brown & Williamson*, 529 U.S. at 133. As the Ninth Circuit properly

concluded, "[t]o say Congress could have drafted the defense more explicitly in § 1437d(*l*)(6) is not to say it did not do so at all." HUD Pet. App. at 18a. In addition, HUD's "negative implication" argument ignores completely the context in which the innocent tenant defense was included in section 881(a)(7).

2. No Adoption By Re-Enactment Or Amendment.

Petitioners' other effort to capitalize on congressional inaction is equally meritless. Petitioners put great emphasis on the failure of Congress, when it amended the predecessor versions of section 1437d(*l*)(6) in 1990 and 1996, to overrule what they contend was HUD's rejection and some state court rejections of the innocent tenant defense. HUD Br. at 37-42. In Petitioners' view, Congress's failure amounted to an "adoption" of HUD's interpretation. *Id.* at 42.

This Court has rejected the implied ratification theory in other contexts and should do so here. In *Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), the Court rejected an SEC regulatory interpretation that the agency had followed since 1944. The SEC had attempted to preserve the interpretation by arguing, among other points, that Congress "should be considered to have approved the Commission's construction" because it had "re-enacted" the statute upon which the interpretation was based "without disapproving the Commission's construction." *Id.* at 119. The SEC claimed Congress acted knowingly because the agency in 1964, when the statute was re-enacted, informed the Senate Committee on Banking and Currency of its interpretation and the Committee approved that interpretation. *Id.* at 120-21 and n.9 & 10.

This Court declined "to presume general congressional awareness of the Commission's construction" on these facts. *Id.* at 121. As the Court explained:

> That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to

> invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency.

Id. at 121; *see also United States v. Calamaro*, 354 U.S. 351, 359 (1957) (deeming "re-enactment to be without significance" in absence of evidence of congressional discussion or other awareness of agency regulation); *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964) (rejecting adoption of judicial decisions in re-enactment where decisions did not represent settled judicial construction); *ABC Rentals of San Antonio, Inc. v. C.I.R.*, 142 F.3d 1200, 1205 (10th Cir. 1998).

Petitioners' "adoption" claims here are no more persuasive. HUD did not promulgate regulations implementing section 1437d(*l*)(6) until 1991, and did not articulate until then its policy of eliminating the innocent tenant defense. HUD Br. at 40. Congress did not amend section 1437d(*l*)(6) again until 1996, *id.* at 41, and HUD makes no showing at all of the "widespread congressional awareness" needed to support the claim that Congress in 1996 knew about and intended to ratify the sweeping no-fault policy Petitioners sponsor.[9]

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[9] HUD's reliance on regulations published in 1988 also fails to support the claim that Congress knowingly adopted a no-fault eviction standard. HUD Br. at 38 n.13. Even beyond the facts that the regulations were promulgated only briefly before Congress passed the original version of section 1437d(*l*)(6) and had only short interim effect before being withdrawn, *id.*, nothing in the 1988 regulations expressly precluded an innocent tenant defense.

3. Other Statutory Provisions Relied Upon By HUD Do Not Support Its Interpretation Of Section 1437d(*l*)(6).

Petitioners' citation to statutes outside sections 1437d(*l*)(6) and 881(a)(7) also offers them no support. HUD first makes reference to former section 1437d(c)(4)(A)(iii). HUD Br. at 31-32. As a preliminary matter, the language upon which HUD relies was superceded in 1996, and the language of the current version does not support HUD's claims. The Ninth Circuit was properly "hesitant to even address an argument for harmonious interpretation when there is no longer a provision to harmonize." HUD Pet. App. at 19a.

Even if the former version of section 1437d(c)(4)(A)(iii) were relevant, it does not support HUD's contentions. This section prevented individuals or families who were evicted because of drug-related criminal activity from receiving a statutory housing preference for three years. It provided an exemption for family members who the agency determined "clearly did not participate in and had no knowledge of such criminal activity." 42 U.S.C.A. § 1437d(c)(4)(A)(iii) (1991).

HUD's strained reading of this superceded statute is misdirected. The plain language of section 1437d(c)(4)(A)(iii) shows Congress's desire to protect the innocent by ensuring that the culpability of a tenant or household member directly engaged in drug activity was not transferred to innocent individuals sharing the same housing. Many public housing households include the elderly, minor children, the disabled, the infirm and others dependent on the physical presence of an adult tenant for daily life. In circumstances where the tenant on the lease engages in drug activity and is evicted, the household members, although totally innocent of wrongdoing would, by necessity, leave public housing with the culpable individual. When it existed, section 1437d(c)(4)(A)(iii) barred denial of future public housing for these innocent dependents solely because of their association with the evicted

wrongdoer; section 1437d(c)(4)(A)(iii) provided that the sins of their caregivers would not be visited upon them.

4. Sections 1437d(*l*)(6) And 881a(7) Perform The Same Function And Accomplish The Same Result.

Finally, HUD's attempt to differentiate sections 1437d(*l*)(6) and 881(a)(7) as unrelated statutes with "different mechanisms" is equally unavailing. HUD Br. at 29. HUD struggles to explain that the statutes are different because "[c]ivil forfeiture is a mechanism by which the government may seize a private property interest to which it previously had no relationship" while "Section 1437d(*l*)(6) is a mechanism by which the government takes back possession of property that it already owns." *Id.* This distinction is meaningless in the context of public housing. The tenant is rendered homeless, either by the forfeiture of the leasehold interest to the federal government or by the eviction by the PHA; in both cases the government has "taken back" the property. HUD also asserts in conclusory fashion that the statutes are different because section 881(a)(7) forfeits property *"to the United States"* while section 1437d(*l*)(6) reverts it *"to the local public housing authority."* *Id.* at 29-30 (emphasis in original). As the Ninth Circuit correctly observed, "[i]t makes little sense" to arbitrarily provide the innocent tenant defense on the basis of whether the federal or local government is the catalyst for eviction. HUD Pet. App. at 17a.

To the extent sections 1437d(*l*)(6) and 881(a)(7) have distinctive characteristics, they only highlight the irrationality of HUD's position. The government can only seek the severe sanctions of section 881(a)(7), subject to all of its attendant due process protections, when the rental unit was "used, or intended to be used" to commit a violation of the Controlled Substances Act "punishable by more than one year's imprisonment." 21 U.S.C. § 881(a)(7). The possibility of forfeiture does not arise until this threshold is crossed. Even when the alleged facts are egregious

enough to trigger section 881(a)(7), forfeiture cannot be used to take away the tenancy of an innocent tenant. In contrast, according to HUD, a PHA has the absolute, unfettered power to evict a tenant innocent of any wrongdoing for any alleged drug activity outside the rental unit even though that activity may result in no arrest or criminal conviction, and amounts to no more than a minor criminal infraction subject only to a minimal fine and no imprisonment. It defies logic to conclude, as do Petitioners, that Congress intended to give the PHAs carte blanche to deprive innocent tenants of their homes for any drug activity no matter how minor, while at the same time providing that HUD could not deprive a public housing tenant of his or her home if innocent of wrongdoing, even though the drug activity was serious and the premises were used in connection with that activity.

II. HUD'S INTERPRETATION OF SECTION 1437d(*l*)(6) AND OHA'S APPLICATION OF ITS LEASE PROVISIONS ARE UNREASONABLE AND CONTRARY TO CONGRESS'S INTENT.

Despite the complete absence of any language reflecting Congress's alleged intent to give HUD and the PHAs the absolute power to arbitrarily seek to evict tenants who are guilty of no wrongdoing and to deprive an innocent tenant of his or her due process protection in the enactment of section 1437d(*l*)(6), HUD has crafted a regulatory scheme that actually prizes the ability of a PHA to evict a tenant innocent of any wrongdoing. HUD has attempted to mask its scheme of eviction without any due process protection by announcing that PHAs should act with "wise and humane judgment" in handling drug-related lease revocations, *Termination of Public Housing Tenancy for Drug-Related Criminal Activity*, 54 Fed. Reg. 15,998 (April 20, 1989), and that PHAs have the "discretion to consider all of the circumstances of the case, including . . . the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." *Public Housing Lease*

And Grievance Procedures, 56 Fed. Reg. 51,560 at ¶ 3.3.3 (October 11, 1991). However, in their briefs both HUD and OHA insist that there is no obligation that the PHAs exercise this discretion. Rather they assert that section 1437d(*l*)(6) gives the PHA the absolute power to evict without regard to innocence. In reality, Petitioners' position is that Congress, in enacting section 1437d(*l*)(6), intended to eliminate all due process protection in drug-related evictions.

HUD's actions and pronouncements belie its claim that, although the PHAs have unfettered power to evict, HUD has encouraged them to act with humane discretion when dealing with evictions involving innocent tenants. A PHA "may proceed with a civil eviction for criminal activity by family members or guests regardless of whether a criminal prosecution has commenced or completed." 56 Fed. Reg. 51,560 at ¶ 3.3.5. Once a PHA decides on its own to evict, HUD emphasizes that the PHA's discretion to protect innocent family members is purely optional. 66 Fed. Reg. at 28,782-28,783. It is an option that HUD does nothing to encourage and instead provides incentives, as discussed below, to discourage. HUD grants PHAs "full authority to initiate eviction" without requiring them to consider, let alone provide, any due process protection to innocent household members. 54 Fed. Reg. at 15,998.

As HUD, OHA and the amici curiae make clear in their briefs, they believe the need to punish innocent tenants by eviction is essential to motivating compliance with federal anti-drug efforts by public housing residents. Protecting tenants who "did not know, could not foresee, or could not control behavior by other occupants" would, in HUD's jaundiced view, only provide excuses for evading responsibility and "undercut the tenant's motivation to prevent criminal activity by household members." 56 Fed. Reg. 51,560 at ¶ 3.3.1. Indeed, shortly after enactment of the current version of section 1437d(*l*)(6) in 1996, HUD issued "One Strike and You're Out" Guidelines to PHAs advising them on the need to implement a "strict" policy to ensure "certain and swift eviction." HUD Notice PIH

96-16 at "Background" (April 12, 1996) (available at www.hudclips.org). Despite claims of encouraging benign discretion, HUD actively advised PHAs to "[m]ake tenants responsible for the conduct of everyone in their households." *Id.* at section III.5. "A promise is a promise. . . . [A] tenant is responsible for the household, regardless of whether he or she was personally engaged in the prohibited drug or other criminal activity." *Id.* Holding the innocent tenant hostage is a linchpin in HUD's anti-drug regulations.

HUD has underscored the emptiness of PHA discretion as a means of protecting innocent tenants by implementing strong rewards and punishments to compel PHAs to evict without exercising discretion. In 1996, HUD implemented the Public Housing Management Assessment Program (PHMAP) to "provide incentives for PHAs to aggressively implement One Strike policies." *Id.* at section I.a. As President Clinton summarized in announcing the rewards program, "for the first time, there will actually be penalties for housing projects that do not fight crime and enforce 'one strike and you're out.'" 32 Weekly Comp. Pres. Doc. 582 (March 28, 1996). Under PHMAP, which was in effect when Respondents' evictions were filed, HUD graded PHAs from A to F on the basis of several factors. *See* 24 C.F.R. § 901 (2001). Under the "lease enforcement" criteria, HUD awarded an A grade to a PHA that could document that it "appropriately evicts any public housing resident" for drug-related activity. *Id.* at § 901.45(c). A PHA received an unfavorable grade if it could not document such evictions. *Id.* PHAs that aggressively evicted tenants and got high grades enjoyed an array of rewards, while PHAs that did not faced budget limitations and other sanctions. *Id.* at §§ 901.130, 901.135. In 1999, PHMAP was superceded by the Public Housing Assessment System, 24 C.F.R. § 902 (2001), which similarly makes HUD rewards and punishments contingent on aggressive implementation of "one-strike" evictions. *Id.* at § 902.43; *see also Public Housing Assessment System*, 63 Fed. Reg. 46,596 at 46,621 (September 1, 1998).

HUD goes even further and asserts that the PHA's eviction decision cannot be contested in any meaningful way by a tenant asserting his or her innocence of any wrongdoing. HUD insists that courts cannot review a PHA's failure to consider the innocence of the evicted tenant or any of the "social and situational factors that HUD's regulations authorize, but do not require, a PHA to consider." 66 Fed. Reg. at 28,782. In HUD's view, courts are limited solely to a mechanical determination of "whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction." *Id.*

By opposing judicial review of any sort, HUD closes the circle on its denial of basic due process to public housing tenants. HUD has excused on a blanket level the obligations of PHAs to follow the administrative due process provisions of the Housing Act in drug-related evictions. The ostensible basis of this blanket exclusion is HUD's "due process determination" certifying that a state or local court allows the tenant the right "to present any affirmative legal or equitable defense which the tenant may have" before eviction. 24 C.F.R. §§ 966.51(a)(2), 966.53(c)(3) (2001). But as this case amply demonstrates, HUD, based on its interpretation of section 1437d(*l*)(6), has told the PHA that there is no innocent tenant defense that need be considered by the PHA when making its eviction decision, and HUD would deny to any court the right to consider such a defense in any eviction action brought by the PHA. The end result is a denial of any meaningful protections to innocent public housing tenants and a grant of unbridled power to a governmental body.

OHA's attack on the elderly and disabled Respondents in this case illustrates the fundamental unfairness and irrationality of Petitioners' actions. In 1998, when Petitioners launched their eviction campaign, Respondent Pearlie Rucker was a 63-year old African-American woman who had lived in public housing for 13 years. HUD Pet. App. at 141a. Ms. Rucker was the head of a household that included her mentally-disabled daughter,

Gelinda, two grandchildren and one great-granddaughter. *Id.* Although Petitioners refer to Ms. Rucker's son, Michael, OHA Br. at 10-11, he did not reside in her public housing apartment. *Id.* Petitioners sought to evict Ms. Rucker and her entire household because Gelinda allegedly possessed cocaine three blocks away from Ms. Rucker's apartment. The district court expressly found, and Petitioners have never contested, that Ms. Rucker "had no knowledge of Gelinda's drug activity; regularly searches her room for evidence of alcohol and drug activity; and has warned her disabled daughter and others that any drug activity on the premises can result in eviction." HUD Pet. App. at 141a; *see also* J.A. at 43-44.

Respondent Willie Lee was a 71-year old African-American woman who had lived for 25 years in public housing managed by Petitioner OHA. Respondent Barbara Hill was a 63-year old African-American woman who had lived in public housing for 30 years. HUD Pet. App. at 142a. Petitioners sought to evict Ms. Lee and Ms. Hill and their households because their grandsons, who reside with them, allegedly possessed marijuana in the parking lot of the housing complex. *Id.* Again, the district expressly found, and Petitioners have not contested, that neither Lee nor Hill had any knowledge of their grandsons' alleged drug-related activity, and that both Respondents "had warned their household members that any drug use or criminal activity on the premises can result in eviction." HUD Pet. App. at 142a; *see also* J.A. at 31, 34.

Respondent Herman Walker was a 75-year old disabled African-American man who had lived in public housing for eight years. HUD Pet. App. at 142a. Because of his disabilities, Mr. Walker cannot live independently and must have an in-home caregiver. *Id.*; *see also* J.A. at 36-37. Petitioners sought to evict Mr. Walker because his caregiver and guests the caregiver brought into Mr. Walker's apartment allegedly possessed cocaine. HUD Pet. App. at 142a. As the district court found, Petitioners do "not allege

that Walker engaged in drug activity or was aware of such activity." *Id.*[10]

The district court and the Ninth Circuit were correct in finding that the evictions of Respondents under these circumstances constituted an abuse of governmental power.

III. PETITIONERS OFFER NO RATIONAL JUSTIFICATION FOR SACRIFICING A TENANT'S DUE PROCESS RIGHTS IN THE WAR ON DRUGS.

Petitioners' expansive interpretation of the application of the lease provisions of section 1437d(*l*)(6) cannot be justified as reasonably necessary to fight the war on drugs as argued in their briefs and the briefs of amici. Respondents, who have as great an interest, if not a greater interest, as any other public housing tenant in seeking to free public housing units from the scourge of drugs, have no argument with a policy that enforces the provisions of section 1437d(*l*)(6) against actual wrongdoers. But it is without dispute that Respondents fit none of the categories of individuals against whom Congress intended this statute to be directed – drug dealers, drug users, gang members, muggers, murderers. Respondents are the very victims that Petitioners assert it was Congress's intention to protect. Petitioners argue that Congress's response to "the drug related 'reign of terror' . . . was to arm PHAs with greater authority to remove those tenants who it believed should be held accountable for the problem." HUD Br. at 34. It then seeks to justify holding innocent tenants, such as Respondents, "accountable" and throwing them out of their homes on four grounds, HUD Br. at 35-37, none of which is supportable, particularly in a legal system that does not permit the sacrifice of innocent individuals on the altar of some allegedly worthy social purpose. As this Court has warned, "[r]egardless of how

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[10] Petitioners have not challenged these findings or Mr. Walker's ADA claims, and these issues are not before this Court.

serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.' " *Brown & Williamson*, 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Moreover, to the extent Congress contemplated a "reign of terror," it appropriately focussed on the dangers posed by drug dealers, gangs, crack houses, and other major problems. *See* S. Hrg. 101-234, *Drugs in Federally Assisted Housing, Hearing Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking, Housing and Urban Affairs*, at 1 (July 20, 1989) (opening statements of Senator Cranston, expressing concern regarding "open drug markets, heavily armed drug dealers, shadow buyers and violent death."); *Drug-Related Criminal Activity in Public Housing*, 135 Cong. Rec. H3942-01, H3943 (daily ed. July 19, 1989) (statement of Rep. Wylie expressing the need to evict "drug terrorists") (available at 1989 WL 193081). The elderly and disabled Respondents here could not be farther from the objects of Congress's attentions.

HUD's first attempted justification is that holding the tenant accountable creates an incentive to the tenant to find out whether or not a household member, guest or other person is engaging in drug-related criminal activity, to warn them of the serious consequences and to take steps to "protect the security of the housing project." HUD Br. at 35. Assuming that the tenant takes all these steps that HUD suggests, how does the denial to that tenant of the opportunity to present his or her actions as a defense to eviction add to the incentive? Common sense would indicate that it has exactly the opposite effect; that same common sense would appear to dictate that the way to encourage the tenant to take the steps HUD alleges would be helpful to rid the public housing units of drugs would be to allow the tenant in any eviction proceeding to demonstrate that he or she is innocent of any wrongdoing and, consequently, avoid eviction.

HUD's second attempted justification is predicated on an unfounded assertion that allowing the tenant to raise

the defense of innocence places some insurmountable burden on a PHA seeking an eviction. HUD Br. at 35-36. In the first place, it is the tenant who has the burden of raising and proving the defense. The government's burden of rebuttal is no more onerous that it is in connection with any other affirmative defense. Further, Congress put these same "difficulties" on HUD in section 881(a)(7) and its recent enhancements. HUD has not suggested that the existence of an innocent tenant defense makes the provisions of section 881(a)(7) of "limited value in restoring peace and security to public housing projects." HUD Br. at 35. There is no reason to think that an innocent tenant defense to an eviction for an alleged violation of section 1437d(*l*)(6) limits its value for that same purpose. Equally destructive of HUD's claim that an innocent tenant defense would impose an impossible burden of enforcement is the fact that a number of local jurisdictions already have permitted safeguards against the eviction of innocent tenants. There is absolutely no showing that evictions for drug activity in those jurisdictions have been rendered ineffective, or that the local PHAs in those jurisdictions are incapable of dealing with drug activities in their public housing projects. *See, e.g.*, B. Johnson, *The Severest Justice Is Not The Best Policy*, 10 J. of Affordable Housing and Community Development Law 234, 261-62 (Spring 2001) (discussing lack of hindrance under innocent tenant state law in Massachusetts).

The third justification advanced by HUD appears to be, in part, a subset of its first justification: the deterrent effect on household members when they understand the impact of their committing a drug violation, and as a bargaining chip for the PHAs who might wish to bar an individual from the premises. HUD Br. at 36. Suffice it to say that it is difficult to understand how evicting the innocent tenant advances the deterrent effect which, by reason of the violation, has proven to be ineffective. The alleged "bargaining chip" justification is even more a product of pure conjecture. Given Petitioners' belief that it is necessary to arbitrarily evict in order to eliminate drugs

from public housing projects, it is totally unrealistic to suggest that a tenant will go to the PHA, tell the manager that a member of the household is engaged in drug activity, and ask the manager to provide assistance. If voluntarily going to the manager does not provide a defense to an attempted eviction, why invite eviction? Better to deal with the problem as best you can when the alternative is certain loss of your home.

Finally, HUD justifies its interpretation of Congress's intent by pleading that public housing is in short supply and that a family, even if it has only one bad actor, doesn't deserve to live there because it is a "threat" to its neighbors. HUD Br. at 37. Admittedly, public housing may be in short supply, but that hardly justifies throwing innocent people out of their homes and HUD's one bad apple, bad family argument is backed up by no authority, much less competent authority. There is no showing that Pearlie Rucker's daughter ever posed a threat to her neighbors; there is no showing that Willie Lee's and Barbara Hill's grandsons smoking a marijuana cigarette ever posed a threat to their neighbors. This is not to excuse the conduct of those individuals, but the appropriate remedy is to deal with the wrongdoer, not to place the blame on the entire family and use it to justify evicting the innocent family member from the home.

What makes Petitioners' extreme interpretation of their power to evict innocent tenants particularly objectionable is the fact that it is totally unnecessary to accomplish the goal articulated by Congress when enacting this statute. While HUD candidly acknowledges that it values the *in terrorem* effect of holding innocent tenants hostage under its no-fault policies, HUD Br. at 35, HUD has conceded the existence of a wide range of effective enforcement mechanisms that do not sacrifice the rights of the innocent. HUD admits that it can resolve drug problems simply by imposing "a condition that family members who engaged in the proscribed activity will not reside in the unit" without evicting the entire family. 56 Fed. Reg. 51,560 at ¶ 3.3.3. HUD expressly advises PHAs that they

can permit "a household to remain in occupancy on the condition that the offending member move and agree not to return." HUD Notice PIH 96-16 at § III.5. "[T]respass laws and restraining orders" are available to enforce the ban on culpable wrongdoers. *Id.* These common-sense approaches eviscerate HUD's assertions here of the need for wholesale evictions of innocent tenants. The argument advanced by *amici curiae* Council of Large Public Housing Authorities, *et al.* in their brief at pages 21-22 that suggests that eviction does not permit selective eviction of wrongdoers and is the only weapon in its arsenal for eliminating a member of a household who participates in drug activities is simply untrue, as HUD's own regulations make clear.

Evicting innocent tenants does not serve HUD's professed goals because an innocent tenant by definition had no knowledge of the alleged criminal activity or had taken reasonable steps to prevent it. Evicting innocent tenants will not make public housing safer; it will only increase the number of victims of someone else's drug activity. Petitioners' overbroad interpretation of section 1437d(*l*)(6) actually works against the goals of national public housing policy by exposing innocent low-income tenants to the threat of homelessness for no rational reason.[11]

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[11] HUD's claim that the innocence defense will create a "perverse incentive for tenants to remain ignorant" of drug activity, HUD Br. at 35, misses the mark. The established concept of culpability for "willful blindness" answers this alleged concern. This concept has already been read into the innocent tenant defense under section 881(a)(7). *See 121 Nostrand Ave*, 760 F. Supp. at 1033 ("[L]ack of knowledge should be construed to mean absence of 'willful blindness.' ").

IV. PETITIONERS' INTERPRETATION OF SECTION 1437d(*l*)(6) RAISES SERIOUS CONSTITUTIONAL ISSUES.

In addition to lacking any support in congressional intent, HUD's extreme regulatory interpretations pose several fatal constitutional flaws. Statutes should be construed to avoid substantial constitutional concerns. *X-Citement Video, Inc*, 513 U.S. at 73, 78 ("It is . . . incumbent upon us to read the statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress."); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

HUD's interpretation inherently violates due process and imposes unconstitutional forfeitures and excessive fines. It also embodies a policy antithetical to the sanctity of the family. Respondents' construction of Congress's intent completely avoids these serious infirmities. On this basis alone, this Court should reject HUD's regulations and affirm the Ninth Circuit's decision. *See X-Citement Video*, 513 U.S. at 78 (declining to address the constitutional issue where an alternate construction avoided the question and was "not plainly contrary to the intent of Congress").

A. Petitioners Assert The Right To Seize A Tenant's Leasehold Without Due Process.

The arbitrary and unfair deprivation of housing inflicted on innocent tenants by HUD's policies patently violates due process. This Court has strongly emphasized the importance of the property interests that are made subject to the unfettered discretion of the PHAs.

> The right to enjoy property without unlawful deprivation, no less than the right to speak or right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the

> personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). These rights and interests merit special protection when they involve the home. " '[S]afeguarding the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.' " *Hodgson v. Minnesota*, 497 U.S. 417, 448 n.33 (1990) (quoting *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

HUD's and the PHAs' seizure of public housing from innocent tenants is precisely the kind of arbitrary deprivation of property that due process forbids. "[T]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998) (internal quotations and citations omitted).

Public housing tenants indisputably hold protected property rights in their leases. Congress amended section 881(a)(7) in the Anti-Drug Abuse Act expressly to declare that public housing leases are property. *See* Section I.B above. The courts have also held that "a public housing tenant's interest in his apartment is a property interest protected by the Constitution." *121 Nostrand Ave.*, 760 F. Supp. at 1027 (citing *Escalera v. New York City Housing Authority*, 425 F.2d 853, 861 (2d Cir. 1970)). Like other property rights, these leasehold interests enjoy constitutional protection. "The expectation of uninterrupted occupation and privacy exist whether the home is held in fee or by lease. A leasehold is subject to constitutional protections against arbitrary forfeiture to the Government." *Id.*

(citing *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976)); *see also Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (finding public housing tenants had "been deprived of a significant interest in property: indeed, of the right to continued residence in their homes").

Government action that strips innocent individuals of these property interests on the basis of guilt by association violates due process. As Justice Stevens has observed, "[f]undamental fairness prohibits the punishment of innocent people." *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting). In our justice system, it is "axiomatic that persons cannot be punished when they have done no wrong." *Id.* at 467 (and cases cited therein).

This Court has repeatedly imposed the requirement of culpability to guard against such arbitrary government action. In *Scales v. United States*, 367 U.S. 203 (1961), the Court confronted a statute criminalizing membership in subversive organizations and found that the statute necessarily required for conviction proof that a member was an "active" member with knowledge of, and the specific intent to further, the organization's illegal purposes. The Court deemed this interpretation necessary to avoid the serious constitutional question that would be raised by the lack of personal culpability:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

Id. at 224-25.

The constitutional requirement of personal culpability applies with equal force even when the government purports to terminate a discretionary public benefit. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Court struck down a loyalty oath statute that permitted the state to

exclude persons from public employment solely because of organizational membership and without regard to their knowledge about the organization. *Id.* at 190. Under the statute, "[a]ssociation alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly." *Id.* at 191. Because the statute inflicted sanctions in the absence of personal culpability, the Court invalidated it on due process grounds. "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." *Id.*

Significantly, the Court rejected the government's argument that the condition was valid because there is no absolute right to public employment:

> To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 191-92.[12]

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[12] This Court has noted in several cases that calling something a government benefit or privilege does not insulate the government's actions from constitutional defects. *See, e.g., Keyishian v. Regents*, 385 U.S. 589, 605-606 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has uniformly been rejected."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."); *see also Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 678-679 ("The recipient of a government benefit . . . cannot be made to forfeit the benefit because he exercises a constitutional right . . . . No more can a tenant in a public housing project be evicted for

This Court has applied the same limiting principle of personal culpability in a variety of different factual and constitutional contexts. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court applied the principle to reject the claim that liability may be imposed solely for an individual's association with an organization that commits unlawful acts. Without proof that the individual had a specific intent to further criminal acts, "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920.

In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court invalidated a statute that excluded undocumented immigrant children from public schools. As the Court held, the government cannot seek to deter the immigration violations of adults by depriving their children of public schooling:

> [T]he children who are plaintiffs in these cases can affect neither their parents' conduct nor their own status. Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

Id. at 219-20 (internal citations omitted). Similarly, in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), the Court struck down a statute treating unacknowledged illegitimate children differently from other children for purposes of receiving worker's compensation payments. The Court applied the same principle recognized in *Plyler* that depriving children of benefits to deter parental conduct "is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing . . . penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent." *Id.* at 175-76.

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the exercise of her right of association, a right protected by the First and Fourteenth Amendments.") (Douglas, J., concurring).

Petitioners' policy of terminating the property rights of innocent tenants in their leases breaches the limiting concept of culpability imposed by this Court as a fundamental guarantee of justice and fairness. Petitioners insist they have the right to dispense with all considerations of culpability and evict tenants based solely on the alleged drug activity of their household members, even where the activity occurs off the premises, without the tenant's knowledge and despite their reasonable steps to discover and prevent such activity. In these extended circumstances, the tenant has no relationship whatsoever to the drug activity, let alone the "substantial" relationship necessary to satisfy due process. *Scales*, 367 U.S. at 224-25. Just as group or family association alone is insufficient to supply a substantial relationship to wrongdoing, the mere fact that a tenant shares a residence with an alleged wrongdoer cannot justify seizing the tenant's protected property rights in the absence of any personal culpability.

Indeed, due process concerns apply here with particular force because the eviction of an innocent tenant is aimed at deterring not the tenant's own conduct but the wrongful conduct of family members merely because HUD and the PHA have dictated that the tenant is to be held "accountable" even though the circumstances might show that there was no way that the tenant could have exercised control. Petitioners' willingness to sacrifice the innocent without giving them an opportunity to establish their innocence is patently "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175.

B. Petitioners Seek To Deny Any Judicial Review Of Their Refusal To Allow An Innocent Tenant Defense.

Petitioners compound the due process violations inherent in punishing the innocent by purporting to completely foreclose any substantive judicial review of evictions under section 1437d(*l*)(6). Petitioners expressly deny that any court can review the reasonableness and fairness of a drug-related eviction or the manner in which a PHA exercises its "discretion" about such evictions. As HUD contends, "conferral of discretion on PHAs in deciding whether to terminate tenancy in each case does not constitute conferral of discretion on local courts to consider factors other than those appropriate under the lease." 66 Fed. Reg. at 28,783. According to Petitioners, the eviction court cannot review the reasonableness of the PHA's action in seeking eviction for the violation of the lease provision and the tenant cannot present an innocent tenant defense. The court's review is limited to an empty ministerial determination of "whether a violation of the lease has occurred and whether the lease provides that such violation is grounds for eviction." *Id.* at 28,782.

Petitioners purport to award themselves sweeping administrative powers unchecked by any judicial review to assure these powers are not used arbitrarily or unreasonably. Petitioners claim an absolute right to decide whether or not to deny the nation's poorest citizens their only decent housing without any judicial oversight to guarantee that Petitioners do not act capriciously or in response to whim, prejudice or even corruption. The arbitrary treatment afforded Respondent Rucker illustrates Petitioners' caprice. Petitioners originally sought to evict Ms. Rucker despite her innocence of any knowledge of or involvement in drug activity, and then abruptly decided to abandon the eviction after she obtained counsel and it was clear that the eviction would be opposed. While Petitioners trumpet the decision to drop Ms. Rucker's eviction as a sign of beneficent discretion, it only underscores how

arbitrary Petitioners' "discretion" is in practice. The next innocent tenants should be protected from Petitioners' thumbs-up or thumbs-down decisionmaking with basic procedural protections and review in court.

To reach the extraordinary conclusions they do on these issues, Petitioners must ignore not only basic due process considerations but HUD's own regulations. HUD has exempted the PHAs from the statutory administrative procedural protections for drug-related evictions in section 1437d(k) by issuing due process "waivers" for 48 of 50 states. *See Notices of HUD Due Process Determinations*, 61 Fed. Reg. 13,276-01 (March 26, 1996); 61 Fed. Reg. 47,953 (September 11, 1996); 62 Fed. Reg. 45,434-01 (August 27, 1997). By HUD's own regulations, these waivers are possible if and only if HUD has made a "due process determination" that the "law of the [PHA's] jurisdiction requires that the tenant must be given the opportunity for a hearing in court which provides the basic elements of due process." 24 C.F.R. § 966.51(a)(2)(i) (2001). HUD defines the basic elements of due process to include the "[o]pportunity for the tenant . . . to present any affirmative legal or equitable defense which the tenant may have." *Id.* at § 966.53(c)(3).

Petitioners' hostility to meaningful judicial review also contradicts Congress's intentions about the role of eviction courts in drug-related evictions. Congress expressly believed that eviction courts would play a substantive role in reviewing a PHA's exercise of discretion. In Senate Report 101-316 discussed above, the Senate Banking, Commerce and Urban Affairs Committee stated that it "anticipates that each case will be judged on its individual merits and will require the wise discretion and humane judgement by the PHA and the eviction court." S. Rep. 101-316, at 179, 1990 U.S.C.C.A.N. at 5941; *see also id.* at 183, 1990 U.S.C.C.A.N. at 5945 (noting availability of statutory due process waiver only when "the tenant will have an opportunity for a hearing in state court which provides the fundamental protections of due process" and that

"state courts are often better able to interpret state landlord-tenant laws" than a PHA grievance panel). As these comments indicate, and in sharp contrast to Petitioners' contentions, Congress contemplated a meaningful role for courts in reviewing eviction decisions. In fact, HUD itself has previously acknowledged that "the one-strike policy must be implemented within the context of the applicable State laws and court systems." *Public Housing Management Assessment Program*, 61 Fed. Reg. 68,894 at 68,923 (December 30, 1996).

Petitioners' effort to avoid due process violations by suggesting that they are simply enforcing a lease contract, HUD Br. at 47-48; OHA Br. at 40-41, is unavailing because it ignores that Petitioners are governmental entities exercising governmental powers. In the public housing context, "[i]t is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. . . . The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." *Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 678 (1967) (Douglas, J., concurring) (quotations and citations omitted).

Petitioners' strained arguments to construe public housing leases as equivalent to private sector rentals fundamentally misconstrues the unique nature of public housing. As Petitioners themselves concede, existing public housing is a scarce resource that does not even begin to meet the demand created by millions of impoverished individuals and families. HUD Br. at 37. In the absence of public housing, many families face homelessness or unstable and unpredictable transient housing in shelters and other stopgaps. The grossly unequal bargaining positions of the government and public housing tenants wholly distinguishes public housing leases from private rentals. To obtain their one chance at decent housing, tenants and applicants for public housing will accept any tenancy terms the government seeks to impose, including terms that no private tenant would even consider accepting. The

due process constraints noted by Justice Douglas serve to correct this imbalance in favor of protecting public housing tenants.

Even if public housing tenancies were equivalent to private rentals, basic contract law shows PHA leases would be unenforceable against innocent tenants. In situations of unequal bargaining power, a contract term beyond the reasonable expectations of the tenant, the weaker contracting party, is unenforceable. *See, e.g., Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820 (1981) ("[A] contract or provision that does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him" and "a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable'."); *see also* Restatement of Contracts (Second) § 208, comment d (1981) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.").

Even if a private lease survived under this scrutiny, eviction of an innocent private tenant does not rise to the certainty Petitioners suggest. In California, "forfeitures of leases are not favored by the law." *Keating v. Preston*, 42 Cal. App. 2d 110, 115 (1940). A lease "condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Cal. Civ. Code § 1442. Moreover, because of the severe penalty that can be inflicted by the loss of a lease, an eviction court is empowered to "relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship." Cal. Civ. Proc. Code § 1179. Assessing hardship requires the court to balance the equities, including the "willful or other character of the breach." *Thrifty Oil Co. v. Batarse*, 174 Cal. App. 3d 770, 777-78 (1985). Consequently, forfeiture in

the private sector is not the automatic event Petitioners suggest.

Significantly, nothing in PHA leases constitutes an unambiguous agreement by innocent tenants to be subjected to eviction for the drug activity of others. Section 9m of respondents' leases provides that the tenant must "assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . Any drug-related criminal activity on or near the premises." J.A. at 59. A tenant could reasonably understand the term "assure" to mean an obligation to exercise only reasonable efforts to control their household members' conduct. A tenant could also reasonably expect the "control" element to be applied consistently with its plain meaning to restrict eviction to cases where the tenant can "exercise a restraining influence over" the wrongful conduct of household members and guests. Further, paragraph 14d of the leases provides that the PHA "may terminate . . . this lease for the Tenant's serious or repeated violation of material terms of this lease such, as . . . not complying with paragraph 9, or other good cause." J.A. at 64. A reasonable reading of paragraphs 9m and 14d in conjunction is that only "serious and repeated" drug activity by a household member will be grounds for termination.

The other ancillary agreements in the record heighten the ambiguity of the leases. In the Occupant's Responsibility form, the tenant agrees to be "responsible for all damages and the conduct of all activities in my apartment," clearly suggesting that there is no responsibility for conduct occurring outside the apartment. J.A. at 68. The Tenant Agreement to Maintain a Drug-Free Environment states that "I understand that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted. I agree . . . to do all I can to prevent the use, sale or possession of drugs in my unit or the involvement in drug-related criminal activity by my household or guests." J.A. at 69. The most reasonable reading of these sentences

is that the tenant may be evicted for household member drug activity only where the tenant has breached the agreement to take reasonable preventive measures.

C. Eviction Of An Innocent Tenant Constitutes An Unconstitutional Forfeiture Of A Property Right.

This Court's teachings on forfeiture highlight the unconstitutionality of Petitioners' policy. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court underscored the constitutional defects inherent in forfeiting the property of innocent owners:

> [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. [Citations omitted.] Similarly the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90.[13] *See also Austin v. United States*, 509 U.S. 602, 629 (1993) ("At some point, we may have to confront the constitutional question of whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question.") (Kennedy, J., concurring).

Petitioners purport to rely on *Bennis v. Michigan*, 516 U.S. 442 (1996) to escape the constitutional concerns expressed in *Calero-Toledo* and *Austin*. Petitioners contend

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[13] As discussed above, Congress formally codified that defense in the Civil Asset Forfeiture Reform Act of 2000 and made it applicable in all forfeiture proceedings.

that *Bennis* permits a state to seize an individual's property "with no showing that she has engaged in any wrongdoing, intentional or otherwise." HUD Br. at 47. Petitioners also assert that this Court definitively rejected in *Bennis* the innocence of the owner of property as a defense to forfeiture. OHA Br. at 41.

Petitioners' selective reading of *Bennis* does not excuse the due process injuries they inflict under section 1437d(*l*)(6). Despite Petitioners' protests, *Bennis* turned on the basic civil forfeiture principle that the property forfeited must be connected to a crime.[14] *Bennis* upheld the forfeiture of petitioner's car because it was the instrumentality used to facilitate illegal sexual activity with a prostitute. *See Bennis*, 516 U.S. at 446 ("[P]roperty may be forfeited by reason of the use to which the property is put"). As the concurring opinions emphasized, "[t]he Bennis automobile, it is conceded, facilitated and was used in criminal activity," and "Mrs. Bennis has not asserted that the car was not an instrumentality of her husband's crime." *Id.* at 453, 455 (Thomas, J., concurring); *see also id.* at 457-58 ("[I]t bears emphasis that the car in question belonged to John Bennis as much as it did to Tina Bennis. At all times he had her consent to use the car, just as she had his. . . . Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment.") (Ginsburg, J., concurring).

In addition, unlike the position asserted by Petitioners, the state statute at issue in *Bennis* was construed to allow a court to exercise its equitable discretion to deny forfeiture. Forfeiture was in fact authorized only after careful consideration by the courts of the equitable factors

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[14] This nexus is particularly clear under section 881(a)(7). As Justice Kennedy observed, section 881(a)(7) assures that "only property used to facilitate a drug offense is subject to forfeiture and consequently only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime." *United States v. Ursery*, 518 U.S. 267, 294 (1996) (Kennedy, J., concurring).

in that case. *See id.* at 444 ("In reaching this disposition, the trial court judge recognized the remedial discretion he had under Michigan's case law."), and 457 ("[T]he state's Supreme Court stands ready to police exorbitant applications of the statute.") (Ginsburg, J., concurring).

In light of these critical differences, *Bennis* not only lends no support to Petitioners' extreme reading of section 1437d(*l*)(6) but actually underscores the dramatic overbreadth of HUD's policy. Even under *Bennis*, termination of Respondents' leasehold interests would be invalid. Here, the alleged drug activity occurred off the tenants' premises, and their apartments and associated leasehold interests could not remotely be characterized as the instrumentality of any crime. In addition, the evictions Petitioners seek here would result in forfeiture of property in which the alleged wrongdoers, who are authorized residents but not the leaseholders, have no direct interest. And Petitioners here contend no safety valve exists under section 1437d(*l*)(6) to allow an impartial reviewing court to act in equity to prevent "exorbitant applications of the statute." *Bennis* only highlights the constitutional infirmity of Petitioners' policy.[15]

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[15] Petitioners' reliance on *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), is similarly misplaced. *Haslip* affirmed that monetary liability may be imposed against corporations and employers on respondeat superior grounds without proof of direct fault. The purposes served by respondeat superior liability plainly have no application to, and cannot justify, the forfeiture of an indigent tenant's home for drug activity that the tenant has no ability to foresee or control. Further, even in the context of corporate respondeat superior liability, the Court in *Haslip* was careful to emphasize the corporation's indirect culpability, stating "Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud identical to those perpetrated against respondents." *Id.* at 14. *Haslip* therefore cannot be read, even in general terms, to support the imposition of liability without any link to culpability.

D. Imposing A Penalty Of The Loss Of An Innocent Tenant's Leasehold Is An Excessive Fine.

Petitioners' policy of terminating leases of innocent tenants whose property is unconnected to crime also violates the Eight Amendment's excessive fine prohibition. "The purpose of the Eighth Amendment . . . was to limit the government's power to punish." *Austin*, 509 U.S. at 609. "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense'." *Id.* at 609-10 (emphasis in original). "[A] civil sanction that cannot fairly be said to solely serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 610 (internal citations omitted); *see also United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998).

Terminating the leases of innocent tenants is a punitive sanction subject to Eighth Amendment scrutiny. Petitioners unequivocally assert that their policy of terminating leases under section 1437d(*l*)(6) is intended to deter potential drug activity. HUD Br. at 36 (stating HUD's no-fault policy creates a "deterrent effect on the drug-related criminal conduct of other persons in public housing."); *see also* 56 Fed. Reg. 51,560 at ¶ 3.3.1 (stating a no-fault standard "gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction."). As this Court has held, "[d]eterrence . . . has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. And where, as here, a forfeiture reaches to property not actually used to commit a crime, it is "*ipso facto* punitive and therefore subject to review under the Excessive Fines Clause." *Id.* at 333 n.8. Furthermore, terminating the leasehold interests of innocent tenants cannot remotely be construed as "remedial" because it serves no purpose in compensating the government for a loss. *Id.* at 329. Consequently, Petitioners' policy falls within the purview of the Excessive Fines Clause.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Bajakajian*, 524 U.S. at 334. The forfeiture of property violates the Excessive Fines Clause if it is "grossly disproportional" to the offense it is intended to deter and punish. *Id.* Nothing could be more disproportional than taking from an innocent tenant property that was not the instrumentality of a crime. *Austin*, 509 U.S. at 627-628 ("[F]orfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense – the building, for example, in which an isolated drug sale happens to occur.") (Scalia, J., concurring).

Even if the threatened forfeitures were measured against the alleged drug offenses themselves (and Respondents' lack of culpability in those offenses were ignored), they would still be "grossly disproportional" in light of the minimal criminal penalties associated with the alleged infractions. *See id.* at 339 n.14 ("In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence."). Here, Respondents are facing eviction due to the alleged possession of apparently small amounts of drugs by their family members and guests. For instance, Respondents Barbara Hill and Willie Lee are being evicted due to their grandsons' possession of marijuana in amounts that might not warrant more than a $100 fine under California law. *See* Cal. Health & Safety Code § 11357(b).

As a final consideration, Petitioners' eviction policy threatens the risks of abuse that are the root of Excessive Fine review. In *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989), the Court found that the central purpose of the Excessive Fines Clause is to limit the government's ability to forfeit property "whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use." *Id.* at 272. By granting unchecked discretion to PHAs and simultaneously providing financial incentives for

PHAs to ignore individualized consideration in evictions, *see* sections II, IV.B above, HUD has created the very risks of misdirected and overzealous enforcement for which the Court expressed concern in *Browning-Ferris*. Accordingly, blind reliance on the "humane discretion" of PHAs – urged by Petitioners as the sole means of safeguarding tenants from unjust and excessive evictions – is insufficient and judicial review for proportionality as a check on PHA discretion is critical.

E. Petitioners' Actions Articulate A Profoundly Anti-Family Policy.

As the Court has made clear, "the Constitution protects the sanctity of the family precisely because the institution is deeply rooted in the Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 618-619 (1984) (stating that "cohabitation with one's relatives" is one of the "highly personal relationships [entitled to] a substantial measure of sanctuary from unjustified interference by the State") (citations and quotations omitted). Of particular application here, the Court in *Moore* noted: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional protection." *Moore*, 431 U.S. at 504.

By ignoring personal fault and threatening tenants with eviction based solely on the conduct of those who live with or visit them, Petitioners' eviction policy places overbearing pressure on tenants to close their households as a means of protecting their only realistic source of housing. That pressure exists even if the tenant is ready and willing to take all reasonable steps to control their family members' conduct, because Petitioners' eviction scheme precludes any consideration of innocence as a

defense to eviction. For instance, where a parent or grandparent has no realistic means of controlling the conduct of their adolescent children or grandchildren at all times and at all places, the only way for the tenant to minimize the risk of eviction under Petitioners' policy is to exclude their children or grandchildren from the apartment altogether. Similarly, even where a grandparent is willing (or compelled by circumstance) to take custody of a grandchild, there would be pressure to exclude visitation by the child's parents, for fear that the parents may, without the tenant's knowledge, have engaged in drug activity outside the premises while deemed a "guest" under HUD's murky standards. No government policy, particularly the one of Petitioners' here that is so intimately bound up with the family and home, should ever impose a disincentive on the ability of families to care for their own.

CONCLUSION

For these reasons, this Court should affirm the Ninth Circuit's decision.

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OAKLAND HOUSING AUTHORITY
AND HAROLD DAVIS,

Petitioners,

v.

PEARLIE RUCKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' primary argument is based on the erroneous assumption that 42 U.S.C. § 1437d(l)(6) should be read "in pari materia" with 21 U.S.C. § 881(a)(7). This is not true where, as here, Congress' intent is clear and unambiguous. This view is buttressed by legislative history and statutory context. This Court should not look to 21 U.S.C. § 881(a)(7) in seeking Congress' intent to resolve the question presented. Civil forfeiture is a tool used by law enforcement agencies, not PHAs, to punish through forfeiture of all property used to make the illegal drug trade easier.

A. The Language Of The Statute Is Clear And Unambiguous.

The parties are in agreement that this case is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As such, if Congress has spoken to the issue before the Court, the Court must give effect to Congress' unambiguously expressed intent. If Congress has not spoken, or if its comment is unclear, then this Court must defer to HUD's permissible construction of the statute. Here, there is no dispute that Congress has spoken regarding section 1437d(l)(6). Accordingly, unless respondents demonstrate that Congress unambiguously embraced their interpretation, HUD's interpretation resolves this dispute. Here, neither the statute, nor HUD's interpretation, includes an ignorant tenant defense.

Respondents seek to avoid HUD's controlling interpretation by citing *FDA v. Brown & Williamson Tobacco*

Corporation, 529 U.S. 120, 132 (2000), and claiming the Court is required to look beyond 42 U.S.C. § 1437d(l)(6) to determine if Congress has spoken to the issue before the Court or, if in speaking, Congress has spoken ambiguously. However, if Congress has not spoken, or has spoken ambiguously, HUD's permitted interpretation controls. Respondents can prevail on this point only if they can show that Congress clearly expressed an intent contrary to HUD's interpretation, something they cannot do even if the Court were to consider other unrelated statutes such as 21 U.S.C. § 881(a)(7). *Chevron*, 476 U.S. at 843 n.9.

No authority has been presented showing Congress even hinted, let alone clearly stated, it intended that tenants be able to avoid eviction under section 1437d(l)(6) by proving ignorance of the activities giving rise to the eviction. Accordingly, and at a minimum, if ambiguity exists as to Congress' intent, we must defer to HUD.

Brown & Williamson does not compel a contrary result. First, and as this Court stated, *Brown & Williamson* was an extraordinary case. The FDA asserted jurisdiction over the tobacco industry, which it had previously and expressly claimed it could not regulate. That event compelled this Court to look further to discern whether Congress had spoken to the issue of jurisdiction. Under those facts, and given tobacco's unique political history, the Court did not confine itself to examining a particular statutory provision in isolation. But, the Court confined its inquiry to those statutes specifically on point, the FDCA's overall regulatory scheme and tobacco-specific legislation enacted by Congress subsequent to the FDCA. *Brown & Williamson*, 529 U.S. at 125. Hence, the Court's

review here should be restricted to harmonizing section 1437d(l)(6) with the Housing Act, and other eviction-specific legislation. It should not extend its inquiry to civil forfeiture statutes that are unrelated in scope and purpose.

United States v. Monsanto, 491 U.S. 600 (1989) and *United States v. Gonzales*, 520 U.S. 1 (1997) are instructive and respondents' attempt to distinguish these cases is unpersuasive. As in *Monsanto*, respondents attempt here to create an exception to a "plain and unambiguous" statute. *Monsanto*, 491 U.S. at 606. Here, respondents demand an *exception* from eviction under section 1437d(l)(6), if they prove they had no knowledge of the prohibited activity. In *Monsanto*, it was an exception from forfeiture of monies to be paid for attorney's fees. *Id.* As in this case, the statute in *Monsanto* lacked even a "hint" of such an exemption. *Id.* at 607. Rejecting respondent's argument the Court explained "Congress' intent is 'best determined by [looking to] the statutory language that it chooses.' " *Id.* at 610 (citation omitted). The Court also found that legislative comment was not helpful because Congress "refused to act on repeated suggestions by the defense bar for the sort of exemption respondent urges here." *Id.* (citation omitted). The court in *Monsanto* concluded that "[t]he short answer is that Congress did not write the statute that way." *Id.* at 611, citing *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Respondents' arguments should suffer the same fate as that in *Monsanto*.

The holding in *Gonzales* did not turn on whether the literal meaning of the statute avoided conflict with other federal statutes and/or avoided absurd results. The Court said "given the straight forth statutory command, there is

no reason to resort to legislative history." *Gonzales*, 520 U.S. at 6. Only the court of appeal in *Gonzales* was "troubled that this rule might lead to irrational results." This Court found that reasoning flawed, explaining that the plain reading of the statute as here, did not conflict with other statutes. *Id.* at 7-8.

B. Statutory Context Confirms An Ignorant Tenant Defense Is Unavailable.

1. The Omission Of A Knowledge Requirement Is Evidence Of Congress' Intent To Allow Evictions Of Ignorant Tenants.

The fact that Congress has not expressly enacted the ignorance defense sought by respondents "argues forcefully that such authorization was not its intention." *Omni International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106 (1987). In *Omni*, the Court found it significant that Congress expressly provided for nationwide service of process in certain of the Commodity Exchange Act's ("CEA") provisions but did not do so in section 22 of that Act. Indeed, noting that the newly amended section 22 was silent as to service of process, the Court rejected an argument similar to the one now made by respondents, i.e., that the provision reflected in other sections of a different statute was implied in the subject statute. *Omni* at 106.

Respondents nonetheless argue that here no evidence exists that Congress was aware of HUD's interpretation of section 1437d(l)(6) when it re-enacted the statute and, therefore, did not consciously act to omit an innocent

owner defense. Respondents' argument is contrary to *Omni* and is simply not supported by the record.

First, there is no claim in *Omni* that Congress was aware of any agency interpretation. As such, lack of Congressional knowledge is inconsequential. Second, legislative history shows that Congress was aware of and considered the ignorance defense. (See *infra*, subsection "C," below.)

2. The Forfeiture Statute Is Not Related To Section 1437d(l)(6).

The civil forfeiture statute and 42 U.S.C. § 1437d(l)(6) are different in scope and purpose. Forfeiture is a "powerful weapon that allows the government to seize profits and proceeds of illegal drug trafficking." *United States v. The Leasehold Interest in 121 Nostrand Avenue, Apt 1-C, Brooklyn, New York*, 760 F.Supp. 1015, 1026 (1991).

No authority, let alone *Brown & Williamson*, justifies reading the "innocent owner" defense into section 1437d(l)(6). There, the Court looked to subsequent and specifically related legislative acts by Congress. (*Brown & Williamson*, 529 U.S. at 133.) Here, respondents seek comparison of a public housing tenant's eviction under a lease to civil forfeiture. The proposition is simply not supported by *Brown & Williamson*.

C. Legislative History Supports Petitioners' Position That Ignorant Tenants Can Be Evicted.

"The constitution sets forth the only manner in which the Members of Congress have the power to impose their

will upon the country: by a bill that passes both Houses and is either signed by the President or repassed by a super-majority after his veto." *United States v. Estate of Romani*, 523 U.S. 517, 535-536 (1998). (Scalia, J. concurring in part and in the judgment.) "Everything else the Members of Congress do is either prelude or internal organization." *Id.*

Regulations and interpretations long continuing without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received Congressional approval and have the effect of law. *United States v. Corello*, 389 U.S. 299, 305-306 (1967).

The fact that in the same year Congress enacted legislation to include "leaseholds" in civil forfeiture statutes and enacted 42 U.S.C. § 1437d(k) (1990), providing for a grievance procedure for residents evicted from public housing, does not mean Congress intended to provide an "innocent tenant" defense for section 1437d(l)(6). The two acts are not synonymous. Again, if Congress wanted to create the defense it knew how to do so. It did not. Instead, legislative history shows Congress had no intention of providing the defense.

Significant here is the enactment of 42 U.S.C. § 1437d(c)(4)(A)(iii) (1990), providing for a waiver of the waiting period for any member of a family of an individual prohibited from tenancy where the agency determines she "did not participate in and had no knowledge of such criminal activity. . . . " This reflects Congress' approval of the eviction of ignorant tenants.

The Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting

Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404 ("Dire Emergency Act"), also fails to support respondents' proposition that Congress approved an unknowing tenant defense. (Resp. Br. at 13.) Although the Act speaks to protections for tenants who were not personally involved in drug-related activity, the protections ended after one year in 1990. *Id.* at § 404(b) 103 Stat. at 129. Again, it underscores petitioners' claim that Congress was aware of the concerns raised by respondents, but declined to provide the defense now sought.

Respondents' reliance on *Security & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), lacks merit. The case in *Sloan* involved an SEC's contrary interpretation of a statute limiting the SEC's authority to suspend trading to ten days. The Court rejected the SEC's argument of "general congressional awareness of the Commission's construction based only upon a few isolated statements within thousands of pages of legislative documents." *Id.* at 121.

That is not the case here. First, unlike *Sloan*, HUD's interpretation is not contrary to Congressional statutes and re-enactments. Nor do petitioners contend Congress' awareness is based on a few isolated statements in the Congressional reports. Congress' awareness of HUD's interpretation of section 1437d(l)(6) is evident, not only through the Congressional record, but legislation adopted and repealed by Congress. (See Dire Emergency Act, *supra*, and 42 U.S.C. § 1437d(c)(4)(A)(iii) (1990).)

United States v. Calamaro, 354 U.S. 351 (1957), merely stands for the proposition that absent any congressional discussion accompanying a regulation, re-enactment is without significance. *Calamaro* at 358-359. That is not the

case here. Moreover, the footnote cited by respondents from *United States v. Powell*, 379 U.S. 48 (1964), is not relevant because this case does not involve an issue of judicial construction of a statute of "which [the Court] could be justified in presuming Congress, by its silence, impliedly approved." *Powell* at 55 n.13 (citation omitted).

D. The Eviction Of Ignorant Tenants Under The Statute Does Not Violate The Constitution.

1. HUD's Interpretation Does Not Violate Due Process Rights.

Respondents and amicus curiae contend that under HUD's interpretation of section 1437d(l)(6), tenants are denied due process because they are unable to raise an "affirmative defense" that they had no knowledge of the drug-related activity by a household member or guest. They argue by inference that an absence of this defense equates to deprivation of due process because "individual guilt . . . is fundamental to our concept of justice . . . ." (Brief Amicus Curiae of the American Civil Liberties Union, et al. at 6; Resp. Br. at 24.)[1]

However, "neither the language of the due process clause of the Fifth Amendment nor [the Court's] cases construing it require any such hobbling restrictions on legislative authority." *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974).

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[1] Amicus curiae concedes the concept of guilt is only appropriate in criminal cases where some element of scienter is required to establish culpability or attachment of civil penalties. *Id.* Hence, it is not appropriate here.

In *Arnett*, petitioners argued that even though Congress chose to provide a benefit to governmental employees, e.g., security against being dismissed without "cause," Congress could not refuse them a full adversary hearing for the determination of "cause." *Arnett* at 147-150.

Respondents were never denied due process. Indeed, respondents' potential eviction under section 1437d(l)(6) commenced with Notices of Terminating Tenancy. (R. 40.) Thereafter, they refused to surrender the possession of their premises, and civil complaints for unlawful detainer were filed with the state court. (R. 31-39.) Although these state actions were stayed pending resolution of the subject action, had respondents proceeded with the unlawful detainer actions, they would have been provided their due process rights to be heard and offer evidence negating the evidence presented by OHA. The simple truth is they want more. They want the benefits of public housing without having to comply with the governing statute's conditions.

However, "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of an act while attacking the constitutionality of one of its important conditions.' . . . The court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." (*Arnett* at 152-153, citing *Fahey v. Mallonee*, 332 U.S. 245 (1974).)

In support of their due process argument, respondents analogize this case to others that are completely different in facts and law. The statutes criminalizing

members of subversive organizations resulted in depriving individuals of life, liberty and property under criminal statutes. *Scales v. United States*, 367 U.S. 203 (1961). Here, tenants are not subject to criminal punishment.

Moreover, this case is not similar to *Plyler v. Doe*, 457 U.S. 202 (1982), an equal protection case involving undocumented immigrant children being barred from public schools. Further, Congress never made findings that undocumented children presented any danger to, and/or threatened, the health and safety of others, as was done here.

a) Respondents' Adhesion Argument Is Not An Issue Before The Court.

Preliminarily, respondents did not raise state contract law issues below in support of their request for preliminary injunction. Nor, did respondents raise these contentions in their brief in opposition at the petition stage here. To raise any one of the contentions in this Court, including adhesion, forfeiture and ambiguity, in the first instance is inappropriate. (*Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971). See also *Youkim v. Miller*, 425 U.S. 231, 234 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).)

Respondents claim that the subject leases are unenforceable under California law as they are contracts of adhesion containing unconscionable terms is not before the Court. (Resp. Br. at 42.) The request for an injunction was not based on this claim. Additionally, the district court below dismissed respondents' "unconscionable" contract claim as preempted. See *Gibbons v. Ogden*, 22 U.S.

1, 210 (1824); *Free v. Bland*, 369 U.S. 663, 666 (1952); *Industrial Truck Assoc., Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997). (R. 168.) Moreover, a contract which is required by law to include certain terms cannot be construed as unconscionable. *Drennan v. Security Pacific Nat. Bank*, 28 Cal.3d 764, 621 P.2d 1318, 170 Cal.Rptr. 904 (1981).

b) Respondents' Forfeiture Argument Is Not Before The Court And Lacks Merit.

Respondents cite to *Keating v. Preston*, 42 Cal.App.2d 110, 108 P.2d 479 (1940), is incomplete and misleading. In *Keating*, a lessor attempted to terminate a lease based on a statute relating to gambling. In addressing the "implied covenant" issue, the *Keating* court said "a lease may be terminated only when it is procured by fraud, for lack of consideration or for breach of expressed or implied covenants contained in the instrument." *Keating*, 108 P.2d at 483. Here, the subject leases contained expressed covenants. *Keating* therefore supports the termination of the leases in this case.

California Civil Procedure section 1179 and *Thrifty Oil Co. v. Batarse*, 174 Cal.App.3d 770, 220 Cal.Rptr. 285 (1985) do not alter the outcome here. Relief is available under C.C.P. § 1179, only on the condition of *full performance of stipulated conditions or covenants*. (Emphasis added.) That does not exist here.

c) Respondents' Ambiguity Argument Is Not An Issue Before The Court And Lacks Merit.

The issue of ambiguity is not before this Court. This issue was never pled in the underlying complaint[2] and there is no evidence respondents did not understand paragraph 9(m) of their leases and the related documents. Hence, the issue of ambiguity is not before the Court and the argument lacks merit.

2. The Purpose Of The Housing Act Justifies The Evictions Of Ignorant Tenants.

Respondents dispute petitioners' justifications for evicting ignorant tenants illogically contending there is no incentive for a tenant to insure prohibited conduct does not occur even if threatened with eviction. The risk of losing one's living unit for engaging in prohibited activity clearly is incentive to assure the activity does not occur. Moreover, respondents cannot seriously argue that the law does not encourage other tenants to provide information for evictions under the statute. Certainly, the fears that other public housing residents have voiced about testifying against a tenant for drug-related activity is not conjecture. These fears are reflected in the findings of Congress that precipitated the statute at issue in this action. (See 42 U.S.C. § 11901. See also *Drugs in Federally Assisted Housing: Hearings on F.566 before the subcomm. on*

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[2] The district court granted leave to respondents to amend the underlying complaint to state a cause of action for an ambiguous contract. (R. 169.)

Housing and Urban Affairs of the Senate Comm. On Banking, Housing, and Urban Affairs, S. Doc. No. 101-234, at 27 (1989).) Tenants are now free to come forward with information without fear that they will be required to testify at trial.

To the extent HUD suggests possible alternatives to the eviction of an entire household, e.g., eviction of the specific household member who engaged in drug activity, the suggestions merely support petitioners' position that PHAs have discretion and are encouraged to consider numerous factors before evicting for drug-related activities.

Equally without merit is respondents' assertion that HUD's grading process for PHAs takes away any discretion to evict under the statute. Under the former PHMAP, and the current PHAS, HUD takes into consideration several factors related to management operations including vacant unit turnaround time, fund work, responses to emergency work orders, annual inspection of units and security. The security factor addresses a PHA's performance in tracking crime, reporting crime and the adoption and implementation of policies related to screening applications and evictions. (24 C.F.R. § 902.43(5) (2001); 24 C.F.R. § 901.45(c) (1996).)

PHMAP and PHAS encourage PHAs to adopt policies and implement procedures in order that evictions can be accomplished properly and legally. Respondents' allegation that HUD unnecessarily encourages PHAs to evict under section 1437d(l)(6) simply lacks merit.

3. Eviction Under The Statute Does Not Constitute An Unconstitutional Forfeiture Of The Property Right.

Respondents argue that the results from eviction under section 1437d(l)(6) and forfeiture of property under the civil forfeiture statutes are the same – tenants lose their leasehold. Hence, the defenses available under the civil forfeiture statutes should apply to evictions based on section 1437d(l)(6). This analysis is too simplistic.

Section 1437d(l)(6) and section 881(a)(7) utilize different mechanisms and have different purposes. Section 1437d(l)(6) is designed to insure that public housing tenants are provided safe, affordable and decent housing and that the scarce supply of housing is properly allocated. Section 881(a)(7) is principally designed to allow law enforcement agencies to frustrate the drug trade by confiscating the tools, monies and property involved. 21 U.S.C. § 801. (H.R. Rep. 106-192, P.L. 106-185 (1999)). Moreover, all right, title and interest in seized property vests in the United States. *Id.*

Because of the enormous revenue that has been generated and government's "increasing and virtually unchecked use of the civil forfeiture statutes," Congress passed legislation providing the "innocent owner" defense for civil forfeitures. (H.R. Rep. No. 106-192 at 5-6, 15.)

The same types of unchecked abuses and attendant enrichment cannot be found under section 1437d(l)(6), where the interest in the public housing property reverts back to the original owner, the local PHA, who, in turn, provides housing for other needy families. The PHA

gains no advantage, monetary or otherwise, from utilizing eviction under section 1437d(l)(6).

Respondents' reliance on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and *Austin v. United States*, 509 U.S. 602 (1993), both civil forfeiture cases, is misplaced. Neither is an eviction case. Moreover, these cases were decided prior to this Court's decision in *Bennis v. Michigan*, 516 U.S. 442 (1996). *Bennis* held that property could be forfeited even if the owner was not involved and unaware her property was being used in connection with illegal activity. *Bennis*, 516 U.S. at 450. Clearly, under *Bennis*, the application of section 1437d(l)(6) to unknowing tenants is constitutional.

4. Eviction Is Remedial, Not Punitive, Therefore, It Is Not An Excessive Fine In Violation Of The Eighth Amendment.

Eviction under section 1437d(l)(6) is remedial in nature and not related to the goal of compensating the government for investigative and enforcement expenses. *City of New York v. Wright*, 162 Misc.2d 572, 573-574, 618 N.Y.S.2d 938 (1994).

PHAs do not have the power to punish and gain no monetary enrichment in terminating a lease only to provide the unit to another family on a long waiting list. The benefit, if any, is to tenants who no longer live in fear of illegal drug activity and to a family who can now receive a home from scarce resources. The purpose behind eviction is remedial, not punitive, and does not constitute an excessive fine. *Austin v. United States*, 509 U.S. 602, 609

(1993); *Browning-Ferris Industries of Vt., Inc. v. Kaeco Disposal, Inc.*, 492 U.S. 257, 266-267 (1980).

E. The Statute Protects Family Units.

Respondents' argument that the subject policy is "profoundly anti-family" completely lacks merit. First, it is the drug-related activity, not the eviction policy that threatens the family units. Second, it is respondents' interpretation of the statute that results in the division of family units. The examples are numerous. Suffice it to say, unsanitary conditions, constant fear of violence, and other atrocious living conditions, significantly interferes with a family's right to enjoy a safe and decent place to live.

There is simply no other way to interpret the policy herein, but that it has the purpose of protecting the family.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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v.

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OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Respondents agree (Br. 4-5) that *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), "frame[s] the analysis in this case." The Court therefore must determine, first, "whether Congress has directly spoken to the precise question at issue," and, if not, whether HUD's construction "is based on a permissible construction of the statute." *Id.* at 842-843. Under that framework, the decision of the court of appeals must be reversed. First, Congress spoke to the precise issue of when tenancies may be terminated when it plainly

provided in Section 1437d(*l*)(6), without qualification for unknowing tenants, that "*any* drug-related criminal activity" by "*any* member of the tenant's household * * * shall be cause for termination of tenancy" (emphasis added). Second, HUD's construction of the statute to mean precisely what it says is manifestly not unreasonable or impermissible; indeed, Section 1437d(*l*)(6) as so construed is not only an obviously correct construction of the statute, it rationally serves several important congressional purposes underlying the statute and is constitutional. It should be upheld according to its terms.

In leases under Section 1437d(*l*)(6), tenants agree to a principle of household-wide responsibility. No one disputes that Section 1437d(*l*)(6) permits the government to deny continued occupancy to an entire household when the actual tenant has violated the lease by engaging in drug-related criminal activity—even if the effect is to remove unknowing and entirely innocent household members. Section 1437d(*l*)(6) in effect generalizes that rule, which is based on the reality that the lease between the public housing authority and the tenant permits occupancy not merely by the tenant, but by the entire household. Just as drug-related criminal activity by the tenant may result in the removal of the entire household, drug-related criminal activity by other members of the household may, under Section 1437d(*l*)(6), have the same effect. The Ninth Circuit's attempt to eliminate that principle of household-wide responsibility should be rejected.

I. THE TEXT OF SECTION 1437d(*l*)(6) DOES NOT REQUIRE PROOF OF THE TENANT'S KNOWLEDGE

Respondents' *Chevron* burden in this case is daunting. There is not a word or phrase in Section 1437d(*l*)(6) that suggests an "unknowing tenant" exception. Respondents must thus attempt to establish not only that Congress had an intention to provide for such an unexpressed exception,

but that such intention is so clear that HUD's contrary construction is impermissible.

The principles of *Chevron* deference have particular force here, since HUD's position that there is no "unknowing tenant" exception was articulated in regulations first adopted soon after the enactment of Section 1437d(*l*)(6) and consistently adhered to in the intervening years. Considerable weight is due "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933). Accord, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414 (1993); *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). "Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).[1]

1. The text of Section 1437d(*l*)(6) is unambiguous in permitting the termination of tenancy based on "any" drug activity by "any" of the specified persons, without any limitation based on the tenant's knowledge. See U.S. Br. 19-20. Respondents identify no word or phrase in Section 1437d(*l*)(6) that could be read—under even a tortured construction—to support an "unknowing tenant" exception.

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[1] This brief addresses the "unknowing tenant" exception created by the preliminary injunction. Respondents refer to a broader, and potentially even more drastic, "innocent tenant defense," which would apply in cases in which the tenant, though aware of the drug activity, "took reasonable steps to prevent the activity from occurring." Resp. Br. 3 n.2; see also Pet. App. 28a n.9. That defense is particularly untenable because a showing that the tenant cannot control drug-related criminal activity would presumably give the household an immunity from removal, regardless of the amount or seriousness of the drug-related criminal activity or the threat it posed to neighbors.

a. Respondents do complain (Br. 8) that the government "places the full weight of its 'plain language' argument on Congress's use of the word 'any' in section 1437d(*l*)(6)." That should be an ample foundation, but even without the word "any," the remaining terms of Section 1437d(*l*)(6) authorize "termination of tenancy" when a member of the tenant's household has engaged in drug-related criminal activity, with no qualification or limitation. See U.S. Br. 19-20. The term "any" simply underscores the absence of any such limitation. The court of appeals' construction permits the termination of a tenancy only on the basis of *certain* drug-related criminal activity by household members—*i.e.*, activity that the tenant knew about. Congress, however, made clear that termination of the tenancy is authorized for "*any* drug-related criminal activity" by "*any* member of the tenant's household." 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999) (emphasis added). Accordingly, respondents cannot carry even the burden of showing that the court of appeals' construction is possible, let alone that it is the *only* possible construction.

b. Respondents respond with the difficult argument that Congress expressed a clear intent respecting the meaning of 42 U.S.C. 1437d(*l*)(6) that can be divined from a different statute in an entirely different title of the United States Code. Respondents argue (Br. 16) that "Congress created section 1437d(*l*)(6) in the same Subtitle in which it expressly provided an innocent owner defense for public housing tenants by amending [21 U.S.C. 881(a)(7) (1988)]"—a pre-existing forfeiture statute that already included an express innocent owner defense—to include leasehold (including public housing) interests. They conclude (Br. 16) that "[u]nder familiar standards of *in pari materia* construction, it reasonably follows that Congress understood the same innocent owner defense to apply to all public housing tenants

when confronted by the threatened loss of their leasehold interests."

Reduced to its essentials, respondents' argument is that Congress expressed an intent—a *clear* intent—to provide for an innocent owner defense in Section 1437d(*l*)(6) by amending a separate, pre-existing property forfeiture statute that already included an innocent owner defense. The problem for respondents is that the much more reasonable inference to be drawn from this legislative change is directly contrary to that urged by respondents. By leaving undisturbed the express innocent owner defense in the forfeiture statute while omitting any such defense in Section 1437d(*l*)(6), Congress surely intended that there be such a defense to forfeiture but not to termination of tenancy under Section 1437d(*l*)(6). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (internal quotation marks and brackets omitted). It is, at the very least, not *un*reasonable to draw that inference from the stark differences in language between Section 1437d(*l*)(6) and Section 881(a)(7). See U.S. Br. 29; *Burton* v. *Tampa Hous. Auth.*, 271 F.3d 1274, 1279-1280 (11th Cir. 2001).

Respondents also fundamentally misunderstand the law of forfeiture when they assert (Br. 18) that the forfeiture statute and Section 1437d(*l*)(6) "are identical in purpose and result." Section 881(a)(7) of Title 21 permits the federal government to obtain ownership interests in private property with which it had no previous connection whatever when it is used to facilitate a drug transaction, while Section 1437d(*l*)(6) supplies a term in a lease—a contract based on the consent of the parties—that provides the basic conditions under which a local housing authority will permit a

private individual the use of the housing authority's own property. Indeed, the lease provision required by Section 1437d(*l*)(6) creates the contractual "privity" and "consent" that this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), deemed significant in distinguishing forfeiture from contract remedies. *All* property — including not only fee interests and public housing leases, but also tens of millions of private leasehold interests throughout the country—is subject to forfeiture if the conditions specified in Section 881(a)(7) are satisfied, while Section 1437d(*l*)(6) applies much more narrowly to public housing leases. See U.S. Br. 29-30. In light of those differences, Congress deliberately provided for an express innocent owner defense in Section 881(a)(7); it deliberately omitted one in Section 1437d(*l*)(6).[2]

2. As HUD's regulations recognize, Section 1437d(*l*)(6) does grant PHAs discretion in deciding whether to invoke the lease's unqualified termination clause and pursue eviction in a particular case:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.

[2] Respondents argue (Br. 8) that Section 1437d(*l*)(6), without an "unknowing tenant" exception, would "deprive a public housing tenant of any meaningful due process protections in seeking to avoid an eviction." Respondents' complaint, however, is not with the undoubtedly constitutional procedures that a state court would apply in an eviction action; it is with Congress's decision in enacting Section 1437d(*l*)(6) not to recognize certain substantive defenses to eviction. Section 1437d(*l*)(6) has no effect on tenants' constitutional rights to procedural protections in eviction actions.

24 C.F.R. 966.4(*l*)(5)(i) (*reprinted in* Pet. App. 171a-172a). See U.S. Br. 20-22.

a. Referring to the HUD regulation, respondents pose the question (Br. 10): "If section 1437d(*l*)(6) is a mandate from Congress to HUD to have PHAs evict any tenant * * * from public housing units where there is a violation of a drug law by a household member * * *, where does HUD find the authority to advise PHAs that they can use discretion in applying this mandate?" That question is easily answered. Section 1437d(*l*)(6) requires use of a lease provision that sets forth a "cause for termination of tenancy." Nothing in Section 1437d(*l*)(6) or any other law, however, requires public housing agencies actually to seek eviction for all violations of that (or any other) lease provision. See U.S. Br. 20-22. As with other lease violations, a PHA is authorized, but not required, to terminate tenancy for violation of the Section 1437d(*l*)(6) lease provision.[3]

b. Respondents' amici Coalition to Protect Public Housing, et al., recount a number of instances in which local public housing authorities are said to have exercised their discretion to seek eviction of tenants with "results that are unjust and so absurd as to raise doubts that Congress could ever have intended" Section 1437d(*l*)(6) to have that effect.

[3] Respondents argue (Br. 10) that HUD's regulations recognize that Congress "did not, in fact, mean 'any' literally to exclude all defenses of innocence," because those regulations provide that drug-related criminal activity by a commercial visitor making a delivery is not in itself a cause for termination of tenancy under Section 1437d(*l*)(6). The regulation to which respondents refer (*reprinted in* U.S. Br. App. 5a), however, is not based on a free-floating "unknowing tenant" exception. It is instead based on HUD's construction of "other person under the tenant's control" in Section 1437d(*l*)(6)—a phrase that HUD has acknowledged is subject to more than one possible interpretation and therefore subject to elucidation by agency regulation. See 66 Fed. Reg. 28,782 (2001).

Amici Br. 5. The narratives, by amici's own admission, are based on the tenants' stories, apparently as told by the tenants to their attorneys, then retold to attorneys for amici, and finally set forth in the latter's words in the brief submitted to this Court. See, *e.g.*, *id.* at 22 n.10 (recited facts "provided by" counsel for the tenant); see also *id.* at 8 n.2, 12 n.4, 15 n.5, 17 n.6, 20 n.8, 22 n.10, 25 n.12. These multiple hearsay accounts should not be relied upon by this Court in considering the issues in this case.[4]

Amici's narratives do, however, illustrate an important point. As the government's opening brief explains (at 35-36), self-interested tenants (as well as the household members involved) may be expected to have more or less elaborate, and difficult to verify, explanations for their claimed lack of knowledge of the drug activity that is the basis for termination of tenancy under Section 1437d(*l*)(6). Under the rule advocated by respondents and amici, a public housing authority would have to accept such self-serving explanations or disprove them in court. Public housing authorities, however, are not criminal prosecution organizations, and disproving such explanations given by two (or more) witnesses (*i.e.*, the tenant and household member or members) in a court of law is likely to be beyond the means of the housing authority. See Council of Large Public Housing Authorities, et al. (CLPHA) Amici Br. 22-23. The state of mind of the party committing a lease violation is not ordinarily a defense to eviction, and making it one here would leave the housing authority with insufficient ability to eliminate

[4] Even if all of amici's stories are entirely accurate, it is not apparent that each of the tenants involved would be subject to termination of tenancy under Section 1437d(*l*)(6), especially in light of the statutory restrictions on eviction for non-drug crimes (*i.e.*, the crime must "threaten[] the health, safety, or right to peaceful enjoyment of the premises by other tenants") and the regulatory definitions of "guest" and "other person under the tenant's control," see U.S. Br. App. 5a (newly promulgated 5 C.F.R. 5.100).

drug criminals —and those who harbor them—from public housing projects.

c. Notwithstanding the regulation expressly recognizing the discretion granted to local PHAs by Section 1437d(*l*)(6), respondents charge (Br. 25) that HUD has "implement[ed] strong rewards and punishments to compel PHAs to evict without exercising discretion." That charge is mistaken.[5]

For example, respondents quote the regulation governing the Public Housing Management Assessment Program (PHMAP), a now-superseded system under which public housing authorities' effectiveness was assessed. Under one of many criteria used in PHMAP covering "lease enforcement," public housing authorities were awarded the highest grade if "[t]he PHA Board * * * has adopted policies and the PHA has implemented procedures and can document that it *appropriately* evicts any public housing resident who *engages in*" the designated criminal activity. 24 C.F.R. 901.45(c)(1) (emphasis added). The PHMAP criterion was thus based on the need to "appropriately" evict residents who themselves "engage in" criminal activity. Cf. Resp. Br. 28 (stating that respondents "have no argument with a policy that enforces the provisions of section 1437d(*l*)(6) against actual wrongdoers"). The PHMAP criterion provided no disincentive to a PHA that exercises the discretion, explicitly recognized by HUD's regulation, to decide not to

[5] Respondents selectively quote (Br. 24-25) from presidential statements and HUD publications to support the proposition that the goal of what was called the "One Strike" policy was to evict as many tenants as possible. That is not correct. The "One Strike" policy refers to the showing necessary to support eviction—a single instance of drug-related criminal activity. It does not refer to the standards under which termination of tenancy should actually be sought, which have consistently recognized the discretion of the public housing authority to determine the appropriate action in each case. See CLPHA Amici Br. 27-29.

evict a tenant who is free of any personal involvement in criminal activity.[6]

II. LEGISLATIVE HISTORY SUPPORTS HUD'S CONSTRUCTION

The legislative history of Section 1437d(*l*)(6) strongly supports HUD's construction of the statute. See U.S. Br. 27-34, 37-44. Respondents continue to rely (Br. 14) on a single statement from a 1990 Senate committee report. But that statement discussed a bill quite different from the one that was enacted, and in any event even that statement does not suggest that public housing authorities are without authority to terminate a tenancy in any particular circumstances. See U.S. Br. 43. Other contemporaneous expressions of congressional intent, including the section-by-section analysis of the original bill containing Section 1437d(*l*)(6), see *id.* at 38-39, and a series of related measures enacted between 1988 and 1990, see *id.* at 30-32, establish that Congress was both aware that Section 1437d(*l*)(6) did not include an "unknowing tenant" exception to its otherwise clear language, and knew how to address issues relating to the termination of tenancy of "unknowing tenants" when it wanted to.

Moreover, in 1996, long after the promulgation of HUD's 1991 regulations definitively stating that Section 1437d(*l*)(6) does not admit of an "unknowing tenant" defense, Congress broadened Section 1437d(*l*)(6) to include criminal activity "on or off"—and not merely "on or near"—the public housing premises. See U.S. Br. 5. Congress also enacted other measures in 1998 that both "prohibit[ed] admission to [public housing] for any household with a member * * * who the public housing agency * * * determines is illegally using a controlled substance," 42 U.S.C. 13661(b)(1)(A) (Supp. V 1999), and authorized termination of the tenancy for those same households, see 42 U.S.C. 13662(a)(1) (Supp. V 1999). See U.S. Br. 37-44; CLHPA Amici Br. 15-21. Under respondents' theory, Congress presumably intended in all of those enactments to re-enact sub silentio an entirely implicit "unknowing tenant" exception, even where that exception would require public housing authorities to grant initial leases to households that included illegal drug users, so long as the tenant could make a case on lack of knowledge of the drug crime at issue. The much more logical conclusion is that Congress, in all of those enactments, intended to adopt HUD's longstanding administrative interpretation of Section 1437d(*l*)(6). *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see U.S. Br. 38-42.

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[6] PHMAP applied only until September 30, 1999. 24 C.F.R. 901.1(c). The new system of assessment, entitled Public Housing Assessment System (PHAS), is similar to PHMAP in relevant respects. See 24 C.F.R. 902.1 *et seq.* Under PHAS, public housing authorities are rated on a 100-point scale, of which one point (or a fraction of a point) may be awarded for "lease enforcement." 65 Fed. Reg. 40,024, 40,025 (2000). HUD has provided that "[t]his component measures whether a PHA has formally adopted policies and implemented procedures to evict residents who the PHA has reasonable cause to believe" satisfy what HUD terms the "One-Strike" criteria—*i.e.*, residents who "[e]ngage in" criminal or drug-related activity prohibited by Section 1437d(*l*)(6) or "[a]buse alcohol" in a way prohibited by 42 U.S.C. 13662(a)(2) (Supp. V 1999) (*reprinted in* U.S. Br. App. 4a). HUD, *Instruction Guidebook for Completing Public Housing Assessment System Management Operations Certification Form HUD-50072*, at 30 (Oct. 2001) <http://www.hud.gov/utilities/intercept.cfm?/offices/reac/pdf/guidebook_oct01.pdf>. The form used by HUD asks, *inter alia*, for "[t]he total number of evictions as a result of the One-Strike criteria." *Ibid.* HUD has noted, however, that "PHAs are scored for this component based on the formal adoption and implementation of eviction policies and procedures and [whether the PHA] has incorporated One-Strike criteria in the eviction of residents." *Id.* at 31. While the raw number of evictions may provide HUD with information that is useful in discussions with PHAs regarding the level of their crime problem, the PHA's score is based on the adoption and implementation of "appropriate" policies for evicting residents who "[e]ngage in" the prohibited activities, not the total number of evictions.

III. HUD'S CONSTRUCTION RATIONALLY SERVES THE STATUTORY PURPOSES

Congress enacted Section 1437d(*l*)(6) in response to a "reign of terror" caused by drug-related violence in public housing. 42 U.S.C. 11901 (1994 & Supp. V 1999). Congress made express findings that "public * * * housing in many areas suffers from rampant drug-related or violent crime," which "leads to murders, muggings, and other forms of violence against tenants," as well as "a deterioration of the physical environment" in the projects. 42 U.S.C. 11901(2) and (4) (Supp. V 1999). Those findings were well supported. Amici International City-County Management Association, et al., explain in detail (Br. 6-10) that, at around the time Section 1437d(*l*)(6) was enacted, the violent crime rate in public housing developments was frequently several times higher than the local average. The court of appeals itself agreed that public housing projects had become "little more than illegal drug markets and war zones," in which "[i]nnocent tenants live barricaded behind doors, in fear for their safety and the safety of their children." Pet. App. 2a.

Section 1437d(*l*)(6) as interpreted by HUD—*i.e.*, without an "unknowing tenant" exception—addresses the crisis situation in a number of ways. First, Section 1437d(*l*)(6) gives maximum incentives to tenants to prevent, discover, and remedy drug problems of household members, rather than to ignore them and thereby retain a defense to eviction. See U.S. Br. 35. Respondents argue (see Br. 29-30) that the incentive is not effective with respect to an "unknowing" tenant who is actually evicted, but the general deterrent effect of the rule of household-wide responsibility is obvious. Respondents also argue (Br. 31) that, absent an "unknowing tenant" exception, some tenants might be afraid to report drug-related criminal activity by their household members to housing management. It is uncertain whether tenants are likely to report drug-related crimes by household members in any event. More importantly, amici's views on whether the incentive structure created by Section 1437d(*l*)(6) in fact works out in practice as Congress intended is of no significance. It is entirely rational for Congress to decide not to include an "unknowing tenant" exception in order both to increase the incentives for tenants to control household members and ban lawbreaking guests from their premises and to decrease the incentives for tenants to remain ignorant of drug-related criminal activity.

Second, adding an "unknowing tenant" exception would create severe enforcement problems. See pp. 8-9, *supra*. Contrary to the court of appeals, see Pet. App. 28a, respondents now concede (Br. 30) that "it is the tenant who has the burden of raising and proving the defense." Even so, the public housing authority will likely face similar obstacles in rebutting the likely testimony of the self-interested tenant and household member that the tenant had no knowledge of the drug-related activity. Respondents argue (*ibid.*) that "[t]he government's burden of rebuttal is no more onerous tha[n] it is in connection with any other affirmative defense." Few if any contract or lease defenses, however, require the parties to litigate the tenant's state of mind, as would an "unknowing tenant" defense.[7]

Third, household-wide responsibility under Section 1437d(*l*)(6) helps housing authorities obtain agreements from tenants in appropriate cases to bar the individual engaged in drug-related activity from the premises. Respondents assert (Br. 30) that there will be no "bargaining chip" under

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[7] Respondents argue that "HUD has not suggested that the existence of an innocent tenant defense makes the provisions of section 881(a)(7) of 'limited value in restoring peace and security to public housing projects.'" Resp. Br. 30 (quoting U.S. Br. 35). Forfeiture actions, however, serve a law enforcement function, are typically undertaken by agencies that have substantial investigative tools available, and are not designed specifically to restore peace to public housing projects.

the HUD interpretation because tenants will be afraid to seek assistance from management. Management, however, has a "bargaining chip" in cases in which it takes the initiative since Section 1437d(*l*)(6) provides the leverage necessary in appropriate cases to encourage tenants to bar drug criminals from their units. Indeed, without such leverage, public housing authorities do not generally have the legal authority to dictate to tenants which household members or guests may be admitted to the unit. See CLPHA Amici Br. 25 (explaining that "as a practical matter, the use of removal and bar is dependent upon the tenant's agreement").[8]

Finally, household-wide responsibility under Section 1437d(*l*)(6) is ultimately based on the proposition that the households of those public housing tenants who—knowingly or unknowingly—harbor drug criminals pose a threat to their neighbors, and that the scarce resource of public housing should be allocated to tenants whose household members do not so threaten their neighbors' security. See U.S. Br. 37. Holding tenants responsible for the conduct of their household members and guests is not uncommon in leases, including elsewhere in the public housing leases at issue in this case. See *id.* at 23-24. Respondents' social policy objections to that principle should be addressed to Congress, not the courts.

IV. THERE ARE NO ALTERNATIVE GROUNDS FOR AFFIRMANCE

Respondents' amici Lawrence Lessig, et al., do not attempt to support the court of appeals' actual reasoning and holding. They argue instead as alternative grounds for affirmance

[8] In many cases involving a minor child engaged in drug activity, barring the minor child while permitting the tenant to remain may not be realistic or desirable. The rationale of household-wide responsibility under Section 1437d(*l*)(6) is, *inter alia*, that parents and guardians should be given maximum incentive to prevent drug activity by their household members before it occurs.

that it is a "faulty premise" to conclude that lease terms that would support eviction "would, as a matter of contract law, be strictly enforced," Br. 15; see Br. 15-22, and that "the leases actually at issue in this case would not support Respondents' eviction," Br. 2; see Br. 6-15. See also Resp. Br. 42-44. Those theories provide no basis for affirming the decision below.

1. The decision below cannot be affirmed on the basis of state contract or landlord-tenant law. Even under general principles of landlord-tenant law, a court may not add limitations and qualifications to a lease provision prescribed by legislation. As the Rhode Island Supreme Court explained, in discussing strict enforcementof a lease provision, "the prevailing view * * * is '* * * that where the law prescribes there shall be a forfeiture the court cannot say there shall be none; that the expression of the legislative will * * * (is) not to be defeated upon the ground that the law is harsh and severe in its character." *Housing Auth.* v. *Massey*, 335 A.2d 914, 915-916 (R.I. 1975) (citing cases). A court may not "reject the balance that [the legislature] has struck in a statute." *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1721 (2001). See also, *e.g.*, *Minnesota Pub. Hous. Auth.* v. *Lor*, 591 N.W.2d 700, 704 (Minn. 1999) ("[A] lease is a form of contract. Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.") (footnote omitted).

If it were otherwise—if the law of a particular State attempted to add limitations to the grounds for termination of tenancy specified in lease terms under Section 1437d(*l*)(6) —then that law would be preempted. A state law that conflicts with a federal statute, see *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000), or frustrates its purposes, see *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000), is preempted. See also *City of New*

York v. *FCC*, 486 U.S. 57, 64 (1988) (similar preemption for regulations). Congress has determined in Section 1437d(*l*)(6) that *any* drug-related criminal activity by *any* household member "shall be cause for termination of tenancy," without regard to the tenant's knowledge of the activity. Section 1437d(*l*)(6) does not give the States a license to engraft whatever limitations and qualifications on termination of tenancy they deem advisable. A State could no more create an "unknowing tenant" exception to Section 1437d(*l*)(6) than it could an exception for criminal activity related to certain particular drugs (marijuana, for example), certain household members (adult household members, for example), or certain categories of public housing (low-rise units, for example). Although amici rely (Br. 21) on purported "equitable considerations," even "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1721 (quoting *Virginian R.R.* v. *Railway Employees*, 300 U.S. 515, 551 (1937)).

In any event, the decision below was not based on—and cannot be defended on the basis of—state contract or landlord-tenant law. Neither court below cited or discussed state-law precedents. The district court refused to abstain in this case on the ground that OHA had "not identified what important state interests are implicated by an unlawful detainer action which involves federally subsidized housing and the interpretation and constitutionality of a lease provision mandated by federal regulations." Pet. App. 146a. The court of appeals similarly made entirely clear that its decision was based on "the proper interpretation of § 1437d(*l*)(6)." *Id.* at 10a; see also Pet. 29. This Court should decide the federal question on which certiorari was granted, not a state-law question that was not passed upon below.

2. The terms of respondents' lease also do not provide an alternative ground for affirmance. Both courts below held

that respondents' leases embody the rule adopted by HUD that precludes an "unknowing tenant" defense, thereby rejecting amici's (and respondents') creative construction of the leases. The court of appeals noted that the lease provisions were "simply the embodiment of" what the court held was HUD's "erroneously broad interpretation of § 1437d(*l*)(6)." Pet. App. 28a. The district court similarly held that the lease terms were "mandated by federal regulations." *Id.* at 146a. There is no reason for this Court to revisit that fact-specific conclusion, rather than decide the questions of far more general importance on which certiorari was granted.[9]

V. SECTION 1437d(*l*)(6) IS CONSTITUTIONAL

Although the court of appeals purported to rest its decision in part on the principle of constitutional avoidance where a statute is ambiguous, see Pet. App. 23a-27a, Section 1437d(*l*)(6)—especially in light of HUD's authoritative construction—is not ambiguous. Accordingly, even the existence of a genuine and serious constitutional doubt would not warrant distorting the plain statutory meaning. In any event, respondents' various efforts to identify constitutional problems in Section 1437d(*l*)(6) fail to raise any such "serious" constitutional doubt. See U.S. Br. 46-49.

1. Based on the proposition that "[p]ublic housing tenants indisputably hold protected property rights in their leases," respondents argue that what they term the "seizure of public housing from innocent tenants is precisely the kind of arbitrary deprivation of property that due process forbids." Resp. Br. 34. To the extent that respondents argue (*ibid.*)

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[9] The decision of the court of appeals could not in any event be affirmed on these grounds because the injunction that court affirmed generally limited OHA's ability to terminate leases. See Pet. App. 165a-166a. Such an injunction could not have been based on the specific terms of respondents' leases (or on any other facts specific to respondents) since it extends to *all* of OHA's tenants, regardless of the terms of their leases.

that the eviction of "unknowing" tenants authorized by the statutorily-mandated lease provision is "without any reasonable justification" and serves no "legitimate governmental objective," those arguments have already been addressed herein. See pp. 12-14, *supra*.

In any event, the fact that tenants have a "property interest" in their leases establishes only that they are entitled to full procedural due process protections before those leases are terminated. *Greene* v. *Lindsey*, 456 U.S. 444, 450-451 (1982). It does not suggest that particular substantive lease terms regarding the conditions of their occupancy violate the Constitution. To the contrary, the substantive lease term required by Section 1437d(*l*)(6) specifically limits the property interest that respondents have acquired.

The cases cited by respondents (Br. 35-37) do not support the kind of constitutional limitations on substantive provisions in public housing leases (or, perhaps, in other government contracts) that respondents seek. Those cases are based on the principles that there may be limits on the extent to which the government may criminalize mere membership in an association, see *Scales* v. *United States*, 367 U.S. 203 (1961), and that government employment may not be conditioned, see *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967), nor civil liability imposed, see *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), based on an individual's exercise of constitutionally protected associational rights. Termination of tenancy under Section 1437d(*l*)(6) is not based on tenants' exercise of constitutionally protected rights. It is based on the breach of lease terms agreed to by tenants that serve important public purposes that redound to the benefit of public housing tenants generally.

2. Respondents argue (Br. 37) that *Plyler* v. *Doe*, 457 U.S. 202 (1982), supports their argument, because the Court

in that case stated that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 220. *Plyler*, however, did not involve a contract, and the general principle for which respondents cite it—that the law may not impose disabilities on children for their parent's misconduct—has nothing to do with this case. To the contrary, it is presumably common ground that children *may* be removed from their apartments—sometimes with dire consequences—when their parents have violated conditions of their leases. Conversely, many States have enacted laws that impose liability on custodial parents or guardians for torts committed by their children.[10] Liability under those statutes is entirely a matter of legal compulsion, unlike Section 1437d(*l*)(6), which is based on the enforcement of lease provisions to which the tenant has agreed. The constitutionality of Section 1437d(*l*)(6) follows a fortiori from the constitutionality of the parental liability statutes. See, *e.g.*, *In re B.D.*, 720 So. 2d 476, 478-479 (Miss. 1998); *Distinctive Printing & Packaging Co.* v. *Cox*, 443 N.W.2d 566 (Neb. 1989); *Board of Educ.* v. *Caffiero*, 431 A.2d 799, 805 (N.J. 1981); *In re Sorrell*, 315 A.2d 110, 114-116 (Md. 1974); but see *Corley* v. *Lewless*, 182 S.E.2d 766 (Ga. 1971), limited by *Hayward* v. *Ramick*, 285 S.E.2d 697 (Ga. 1982).

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[10] See, *e.g.*, Ariz. Rev. Stat. Ann. § 12-661 (West Supp. 2001); Cal. Civil Code § 1714.1 (West 1998); Conn. Gen. Stat. Ann. § 52-572 (West Supp. 2001); Fla. Stat. Ann. § 741.24 (West 1997); Ind. Code Ann. § 34-31-4-1 (Michie 1998); La. Civ. Code Ann. art. 2318 (West 1997); Mass. Gen. Laws Ann. ch. 231, § 85G (West 2000); Me. Rev. Stat. Ann. tit. 14, § 304 (West Supp. 2001); Miss. Code Ann. § 43-21-619 (1999); Mo. Ann. Stat. § 537.045 (West 2000); Mont. Code Ann. § 40-6-237 (1999); Neb. Rev. Stat. Ann. § 43-801 (Michie 1999); N.Y. Gen. Oblig. Law § 3-112 (McKinney 2001); Ohio Rev. Code Ann. § 3109.09 (Anderson 2000); Okla. Stat. Ann. tit. 23, § 10 (West Supp. 2002); Or. Rev. Stat. § 30.765 (1999); 23 Pa. Cons. Stat. Ann. § 5502 (West 1991); Tenn. Code Ann. § 37-10-103 (1996); Wis. Stat. Ann. § 895.035 (West Supp. 2000).

More fundamentally, *Plyler* was based on the fact that the state law in that case, which deprived children of undocumented aliens of the ability to attend public schools, "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status." 457 U.S. at 223. The Court's conclusion in *Plyler* that such a classification violates the Equal Protection Clause has no bearing on the question whether the lease term required by Section 1437d(*l*)(6) is constitutional.

3. Finally, respondents argue (Br. 47) that the lease provision required by Section 1437d(*l*)(6) "violates the Eighth Amendment's excessive fine prohibition." As this Court has explained, "[t]he Excessive Fines Clause * * * limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks omitted). Because the Clause has to do with the involuntary imposition by the government of penalties on an individual, it has been applied to forfeitures of property (as in *Bajakajian*), which are not based on consent. The Excessive Fines Clause has nothing to do with the terms on which the government and a private party may contract for the private individuals' use of government property, nor does it have any application to the circumstances under which the government may enforce its contractual and property rights to take back possession of its own premises. Expanding the Excessive Fines Clause to police government contracts or leases would be inconsistent with its text, purposes, and history.

* * * * *

For the reasons given above and those in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2002

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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

v.

PEARLIE RUCKER, *et al.*,

Respondents.

OAKLAND HOUSING AUTHORITY, *et al.*,

Petitioners,

v.

PEARLIE RUCKER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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29 pp

QUESTION PRESENTED

Whether the lease clause mandated by 42 U.S.C. § 1437d(*l*)(6) authorizes public housing authorities to terminate tenancies on the basis of drug-related criminal activity by household members or guests irrespective of the tenants' knowledge of, or control over, the drug-related criminal activity.

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INTERESTS OF THE AMICI CURIAE

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to the support of government efforts to ensure that law-abiding citizens can feel safe while in their homes and walking in their neighborhoods. In particular, WLF has appeared before this court as well as other federal and state courts to support government efforts to control the sale of illegal drugs and the violence necessarily attendant to such sales. *See, e.g., City of Chicago v. Morales,* 527 U.S. 41 (1999); *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995); *Earls v. Bd. of Education,* 242 F.3d 1264 (10th Cir. 2001), *cert. granted*, ___ U.S. ___, No. 01-332 (U.S., Nov. 8, 2001); *Housing Opportunities Comm'n v. Lacey*, 332 Md. 56 (1991).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that those who suffer the most from the drug trade and associated violence are those, such as occupants of government-subsidized housing, who cannot afford housing in areas away from the center of drug activity. *Amici* believe that the government should take

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

every available step to provide all law-abiding citizens -- regardless of income -- with housing that is not ravaged by the effects of drug dealing.

Amici submit this brief in support of Petitioners with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT

In the interest of brevity, *amici curiae* incorporate by reference the Statement contained in the brief of Petitioner United States Department of Housing and Urban Development ("HUD").

The Statute. In short, public housing in this country has been devastated by an epidemic of drug-related criminal activity. Congress responded to this crisis by passing the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. § 11901 (1994 & Supp. IV 1998)).

At issue here, one of the statute's key weapons was the requirement that leases used by public housing authorities (PHA) shall:

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.

42 U.S.C. § 1437d(*l*)(5) (1989).

This section has been amended several times since its enactment. In 1990, the Cranston-Gonzalez National Affordable Housing Act substituted the more specific "criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises" for the introductory language generally related to criminal and drug activity. Pub. L. No. 101-625, § 504, 104 Stat. 4185 (codified at 42 U.S.C. § 1437d(*l*)(5) (1994)). In 1996, the statute's reach was extended by replacing the phrase "on or near such premises" with the phrase "on or off such premises." Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 836 (codified at 42 U.S.C. § 1437d(*l*)(6) (Supp. IV 1998)). Finally, in 1998 subsection (*l*)(5) was redesignated (*l*)(6).

As currently codified, the statute requires that public housing leases shall:

> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Id. (1998).

HUD's Regulations. In 1991 HUD promulgated regulations implementing the statute. In the process of doing so, HUD received comments urging that the regulations include

an element of fault, knowledge, or foreseeability on the part of the tenant. HUD rejected these pleas, concluding that "[t]he tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit." Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991).

As enacted, the HUD regulations closely tracked the pre-1996 statutory language:

> To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for the termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i). The regulations have since been revised to take into account the 1996 statutory amendment, substituting the phrase "on or near such premises" with "on or off such premises." See 66 Fed. Reg. at 28,802-28,803 (promulgating 24 C.F.R. § 966.4(f)(12)(ii)(B) and 24 C.F.R. § 966.4(*l*)(5)(i)(B)).

Importantly, HUD's regulations do not require PHAs to evict tenants for every drug infraction, but instead authorize PHAs to exercise discretion "to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. § 966.4 (*l*)(5)(i).

The Proceedings Below. This case arose when, in late 1997 and early 1998, Petitioner Oakland Housing Authority instituted separate eviction proceedings against four tenants pursuant to the lease clause mandated by 42 U.S.C. § 1437d(*l*)(6). The tenants, in turn, sought an injunction against their eviction in the United States District Court for the Northern District of California. The district court granted the tenants a preliminary injunction. Pet. App. 138a-166a.

A panel of the Ninth Circuit reversed the district court and vacated the preliminary injunction. Pet. App. 68a-137a. The panel based its decision on the plain language of the statute, which it held "makes any drug-related criminal activity engaged in by a tenant, household member, or guest cause for termination regardless of whether the tenant knew of such activity." *Id.* at 107a.

On rehearing en banc, the Ninth Circuit affirmed the district court's decision by a 7-4 vote. Reviewing the proper interpretation of § 1437d(*l*)(6) *de novo*, the majority held that "if a tenant has taken reasonable steps to prevent criminal activity, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a

household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." *Id.* at 26a.

The majority found that the language of § 1437d(*l*)(6) "does not expressly address the level of personal knowledge or fault that is required for eviction, or even make it clear who can be evicted," and concluded that this silence rendered the statute ambiguous. Pet. App. 12a. The majority then examined related statutory provisions and the legislative history of § 1437d(*l*)(6) and concluded that "Congress had an intention on the precise question at issue that is contrary to HUD's construction." Pet. App. 11a. Accordingly, the majority held that "HUD's interpretation is not entitled to deference" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In reaching this conclusion, the majority looked to 21 U.S.C. § 881(a)(7) (1982 ed. Supp. V 1987), a civil forfeiture statute that includes an "innocent owner" defense precluding forfeiture "by reason of any act or omission established by th[e] owner to have been committed or omitted without the knowledge or consent of that owner." The majority noted that Congress in 1988 amended 21 U.S.C. § 881(a)(7) specifically to include leasehold interests among the property that was subject to forfeiture if used to commit or facilitate a drug-related offense, the same year Congress first enacted what is now § 1437d(*l*)(6). See Anti-Drug Abuse Act of 1988, § 5105, 102 Stat. 4301. The majority "presume[d] Congress meant [the forfeiture provision and § 1437d(*l*)(6)] to be read consistently." Pet. App. 17a.

The majority also relied on the legislative history of the 1990 amendment to § 1437d(*l*)(6). The committee report on the Senate version of the bill stated:

> The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 316, 101st Cong., 2d Sess. 179 (1990). Rejecting HUD's argument that the report underscores "Congress's intent to confer wide discretion on HUD and the local PHAs" (Pet. App. 20a), the majority held that the "reports are very clear that such evictions *would not* be appropriate, and that in such circumstances good cause to evict *would not* exist." *Id.* at 21a (emphasis in original).

The majority also believed that HUD's interpretation of the statute should be rejected because it would lead to "absurd results" and conflict with § 1437d(*l*)(1)'s prohibition on "unreasonable" lease terms. Pet. App. 21a. The majority speculated that the statute would permit eviction, for example, "if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana" or for "a drug crime years earlier." *Id.* at 22a.

Finally, the majority concluded that the principle of constitutional avoidance supported its result, because "[p]enalizing conduct that involves no intentional wrongdoing

by an individual can run afoul of the Due Process Clause." Pet. App. 24a. Without discussing any issues concerning the allocation of the burden of proof, the majority stated that "OHA remains free to proceed with evictions for off-premises drug activities when *it can prove* the tenant knew or should have known of the activity." Pet. App. 28a (emphasis added); see also *id.* at 29a and n.10.

The en banc dissent concluded that the statutory language was "clear on its face" in permitting evictions without regard to the tenants' knowledge. *Id.* at 33a. Although the dissent believed the statutory language was dispositive, the dissent went on to examine the statutory context and legislative history, concluding that both supported HUD's construction of the statute. For example, the dissent argued that Congress's inclusion of express "innocent owner" language in the forfeiture statute merely underscored the significance of Congress's omission of any similar language in § 1437d(*l*)(6). Pet. App. 42a-44a. See also *id.* at 40a-42a (discussing 42 U.S.C. § 1437d(c)(4)(A) (1994)).

The dissent disputed the majority's contention that permitting the eviction of tenants who were ignorant of the drug-related conduct would violate § 1437d(*l*)(1)'s ban on "unreasonable" lease terms. In the dissent's view, "[t]he ignorant tenant eviction provision rationally addresses" Congress's concerns about the serious problems caused by drug crimes in public housing projects, because it gives the public housing authority "a credible deterrent against criminal activity" and because "requir[ing] proof of knowledge on the part of the tenant of the criminal activity of a guest is impractical" in any case in which the tenant was

not himself found in the presence of the offender during the drug-related criminal activity. Pet. App. 51a. Moreover, the dissent stated that the provision empowers other tenants to report drug-related activity, and thereby to help clean up their own projects, "without fearing the possibility of retaliation" from drug dealers. *Id.* at 53a. The dissent observed that "a provision permitting the eviction of unknowing tenants because of the wrongdoing of their household members or guests is a common and enforceable provision in leases between private owners of property and their tenants" and that fact "attests to [its] reasonableness." *Id.* at 54a.

Finally, the dissent concluded that § 1437d(*l*)(6) is constitutional without an "innocent tenant" exception. The dissent explained that "[t]he failure to distinguish between the knowing and unknowing tenant need survive only minimal scrutiny," especially in light of the fact that "Congress must draw distinctions 'in order to make allocations from a finite pool of resources.'" Pet. App. 60a (quoting *Lyng v. International Union, UAW*, 485 U.S. 360, 373 (1988)). The dissent asserted that § 1437d(*l*)(6) easily satisfies minimal scrutiny as it "facilitates the eviction of truly culpable tenants, creates incentives for all tenants to report drug-related criminal activity, and provides a credible deterrent against criminal activity." *Id.* at 61a. And "[b]ecause the eviction provision is discretionary, the provision also motivates tenants to accept remedial actions short of eviction." *Ibid.*

The Court granted review in Case No. 00-1770 on September 25, 2001 and in Case No. 00-1781 on October 1, 2001 and consolidated the cases.

SUMMARY OF ARGUMENT

The severity of the epidemic of drug-related criminal activity in public housing cannot be overstated. Millions of law abiding citizens are hostages in their own homes. They live in constant terror of gangs, shootings, and violence, intimidated into silence and inaction.

Recognizing the gravity of the problem, Congress enacted § 1437d(*l*)(6) of the Anti-Drug Abuse Act of 1988 to provide PHAs a potent weapon to combat the scourge of drugs. In doing so, Congress unambiguously provided that PHAs may terminate tenancies for drug-related criminal activity of those on public housing premises at the tenant's behest regardless of whether the tenant knew of the drug activity or had the ability to prevent it.

The Ninth Circuit majority opinion below wholly eviscerates § 1437d(*l*)(6) and thwarts its intended effect. The vast majority of criminal activity in public housing is perpetrated by non-residents. By relieving tenants of strict accountability for the criminal elements they invite onto public housing, the Ninth Circuit has effectively rendered PHAs powerless to improve the safety of their residents. Moreover, by assigning PHAs the burden of proof concerning the tenants' knowledge, the Ninth Circuit has made it virtually impossible for PHAs to evict even those tenants who do know of the criminal activity of their household members and guests.

The Ninth Circuit majority committed two fundamental errors in reaching its conclusion. First, it erred in looking beyond the plain statutory language where that language was

unambiguous. Second, it improperly concluded that Congress intended to impose a knowledge or control requirement. The statutory scheme and legislative history of § 1437d(*l*)(6) belie that conclusion. Thus the Ninth Circuit erred in refusing to defer to HUD's reasonable interpretation of the statutory language.

ARGUMENT

I. Drug-Related Criminal Activity In Public Housing Is a Serious Epidemic and Cannot Be Effectively Addressed Without Holding Tenants Strictly Accountable for Bringing Drug Criminals onto Public Housing

The dire consequences of the drug epidemic in public housing are well-known and beyond dispute. In enacting the Anti-Drug Abuse Act of 1988, Congress found in pertinent part:

> (2) public housing projects in many areas suffer from rampant drug-related crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public housing tenants;
>
> (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to deterioration of the physical environment that requires substantial government expenditures. . .

Pub. L. No. 100-690, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. § 11901 (1994 & Supp. IV 1998)).

These findings are equally, if not more, pertinent today. In a rare point of agreement, both the majority and dissent below acknowledge the continuing scourge. *See* Pet. App. 2a (majority opinion, "many of our nation's poor live in public housing projects that, by many accounts, are little more than illegal drug markets and war zones. Innocent tenants live barricaded behind doors, in fear for their safety and the safety of their children."); Pet. App. 32a (dissenting opinion, noting the "devastating and worsening epidemic of drug related crime and violence in public housing").

The Ninth Circuit opinion below effectively ensures the perpetuation of the crisis. The vast majority of criminal acts in public housing are committed by non-residents. *See* Department of Housing and Urban Development, *A Promise Being Fulfilled, The Transformation of America's Public Housing, A Report to the President*, Chapter 5 (July 2000) (77 percent of the arrests in public housing in Macon, Georgia in 1997 were non-residents); Torry and Ifill, *HUD Drug Ruling is Played Down; Streamlining Evictions Process May Not Aid Cities Much, Experts Say*, Wash. Post. Apr. 1. 1989 at A4 (more than 85 percent of arrests on public housing grounds in San Francisco during study period involved non-residents); Drugs in Federally Assisted Housing: Hearing on S. 566 before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 101st Cong., 1st Sess. 11 (1989) (statement of Vincent Lane) (approximately 80 percent of the crime in Chicago's public housing during study period was attributed to non-residents); Drug Problems and

Public Housing: Hearing Before the House Select Comm. on Narcotics Abuse and Control, 101st Cong., 1st Sess. 6 (1989) (testimony of Secretary Kemp). Quite simply, inviting drug criminals onto public housing increases the likelihood of drug crimes on site. The Ninth Circuit's imposition of a barrier to the eviction of tenants responsible for bringing a criminal element on site renders PHAs powerless precisely where they need the strongest weapons.

Moreover, by arguably assigning the burden of proof concerning the tenant's knowledge of, or control over, the wrongdoer to the PHA (*see* Pet. App. 28a), the Ninth Circuit has made it unlikely PHAs will be able to evict even those tenants who *do* have knowledge of their household members' or guests' drug activity, parties who all sides agree should be evicted. Faced with the possibility of eviction, and terrorized by the fear of retribution, the tenant has every incentive to deny knowledge or control. Witnesses will likewise be frightened into silence. And the household member or guest engaged in the criminal activity has every incentive to confirm the tenant's denial. It will be all but impossible for PHAs to prove otherwise in these circumstances, particularly given that PHAs do not enjoy prosecutorial investigative powers such as grand jury subpoenas and wiretaps.

The end result of the Ninth Circuit's decision is to make it easier for PHAs to evict a tenant for not paying rent than for posing a serious threat to the health and safety of the other residents. Compounding this untenable result, by opening the door to excuses for tenants' professed lack of knowledge, the majority undermines tenants' motivation to eradicate drug activity from public housing.

Ironically, while the objection of the Ninth Circuit and others to the eviction of so-called "innocent tenants" is clearly motivated by notions of equity and fairness (*see* Pet. App. 22a-23a), the Ninth Circuit's decision begets inequity and unfairness. Those who object to the eviction of "innocent tenants" are concerned with the hardship to the evicted tenant and household members. Protecting the "innocent tenant" and household members, however, sacrifices the interests of the many (the law abiding tenants victimized by drugs and crime) to the interest of the few (the evicted tenants and household members). Given that demand for public housing exceeds supply, it also necessarily displaces other equally needy families on the waiting list. Therefore, the Ninth Circuit's opinion cannot be justified on equity or fairness grounds.

II. The Statutory Language Unambiguously Provides for Termination of Tenancy Regardless of the Tenant's Knowledge of, or Control Over, the Offending Criminal Activity

Section 1437d(*l*)(6) is unmistakably clear. It provides, "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." It contains no mention of a requirement that the tenant must have knowledge of, or control over, the drug-related criminal activity of household members or guests in order to support eviction.

Basic rules of grammar dictate that the statute is not susceptible to a reading that imposes a control requirement

with respect to household members and guests. The statute contemplates four categories of individuals whose drug-related criminal activity can be cause for eviction: (i) the tenant, (ii) members of the tenant's household, (iii) the tenant's guests, and (iv) other persons under the tenant's control. The control requirement modifies only the fourth category. It has no applicability to the first three.

To justify its resort to extra-statutory materials, the majority contends that the statutory language is ambiguous. This conclusion runs afoul of several basic precepts of statutory interpretation. First, contrary to the majority's assertion (*see* Pet. App. 12a), the fact that the statute does not expressly state the level of knowledge or fault required, does not render it ambiguous. To hold otherwise, ignores the plain meaning of the term "any" in the phrase "any drug-related criminal activity" can be cause for termination of a tenancy. As stated by the Ninth Circuit panel, "A statute covering 'any drug-related criminal activity' has the same exact scope as one covering 'any drug-related criminal activity *including that of which the tenant is unaware*' or 'any drug-related criminal activity *regardless of the tenant's knowledge thereof.*'" *See* Pet. App. 87a. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (*quoting Webster's Third New International Dictionary* 97 (1976)).

Further, the claim of ambiguity flouts the import of the disjunctive "or" preceding the phrase "other person." The "or" serves to differentiate "other persons" -- who must be "under the tenants control" -- from the first three categories (the tenant, members of the household, guests) for whom no

similar limitation is applicable. Reading the "or" entirely out of the statute in order to support the assertion that the phrase "under the tenant's control" modifies each of the four categories, impermissibly renders the enumerated categories superfluous. *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994)) ("we read [the statute] with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate ... to treat [as surplusage] statutory terms in any setting.'").

In the face of this unambiguous statutory language, the majority erred in looking beyond the statute. "Where there is no ambiguity in the words, there is no room for construction." *United States v. Gonzales*, 520 U.S. at 8 (quoting *United States v. Wittberger*, 18 U.S. (5 Wheat.) 76 (1820)).

III. The Statutory Context and Legislative History Also Support Termination of Tenancy Irrespective of the Tenant's Knowledge of, or Control Over, the Offending Criminal Activity

Even assuming, arguendo, that resort to extra-statutory language was appropriate, the Ninth Circuit erred in refusing to defer to HUD's interpretation of § 1437d(*l*)(6). The framework for analyzing the deference due HUD is set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the statute is silent or ambiguous, the court must defer to the

agency's interpretation unless its is arbitrary or capricious. *Id.* at 842-843 & n.9.

The majority found that Congress "had an intention on the precise question at issue" -- namely, that PHAs are not permitted to evict so-called "innocent tenants." Pet. App. 10a-11a. Accordingly, the majority concluded that HUD's interpretation was not entitled to deference. *Id.* These findings are contrary to the statutory scheme surrounding § 1437d(*l*)(6), the legislative history of the statute, and Congress's treatment of it since its enactment, all of which indicate that Congress intended to permit discretionary eviction of those who invite a criminal element onto public housing, irrespective of their culpability.

A. Related Statutory Provisions

1. 42 U.S.C. § 1437d(c)(4)(A)(iii)

As it stood until 1996, 42 U.S.C. § 1437d(c)(4)(A)(iii) prohibited individuals or families who had been evicted from public housing because of drug-related activity from receiving a statutory housing preference for three years, but exempted anyone who did not participate in or have knowledge of the criminal activity. The distinction in § 1437d(c)(4)(A)(iii) between evicted tenants who had knowledge of the drug-related activity and those who did not have such knowledge would be unnecessary surplusage if "innocent tenants" could not be evicted under § 1437d(*l*)(6). Under the well-established principle that statutes are to be construed so as to give meaning to each word, 42 U.S.C. § 1437d(c)(4)A)(iii) indicates that Congress intended the

eviction of "innocent tenants" under § 1437d(*l*)(6). *Bailey v. United States*, 516 U.S. at 145.

2. 21 U.S.C. § 881(a)(7)

21 U.S.C. § 881(a)(7) makes leasehold interest used to commit drug-related criminal activities subject to forfeiture, but includes an explicit exemption for "innocent owners." "[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner." *See* 21 U.S.C. § 881(a)(7). The inclusion of the express "innocent owner" exception in the civil forfeiture statute evidences Congress's ability to separately provide for "innocent tenants" when it wishes to do so.

Moreover, because § 881(a)(7) was amended to include leasehold interests as property subject to forfeiture concurrently with the original passage of § 1437d(*l*)(6) as part of the Anti-Drug Abuse Act of 1988, canons of statutory construction call for the disparate inclusion and exclusion of an "innocent tenant" exception to be presumed intentional and given effect. "[W]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

While the parties and lower courts can and do dispute the wisdom of Congress's distinction between forfeiture and

eviction, that dialogue has no impact on the effect to be given Congress's words.

3. 42 U.S.C. § 1437d(*l*)(1)

Section 1437d(*l*)(1) bars PHAs from including unreasonable terms and conditions in their leases. The majority makes a normative judgment that evicting "innocent tenants" is unreasonable and thus concludes that § 1437d(*l*)(6) cannot be read to authorize the eviction of "innocent tenants" without conflicting with § 1437d(*l*)(1). Pet. App. 13a-15a.

To the contrary, eviction of "innocent tenants" is rationally related to the PHAs' legitimate end of eradicating drugs from public housing. By removing the insuperable obstacle of proving tenants' knowledge, strict accountability serves as a credible deterrent against drug-related criminal activity and enables public housing residents to reclaim the safety of their homes without fear of retribution. *See* Pet. App. 49a-55a. Also, it is eminently reasonable for HUD to assume that public housing will be safer if PHAs evict tenants whose household members and guests have been engaging in drug activity, regardless how "innocent" of wrongdoing those tenants may be.

Moreover, it is commonplace for conventional leases to hold tenants liable for the activities of their household members and guests. The "contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for the management of the housing." 56 Fed. Reg. 51560, 51566 (Oct. 11, 1991). This entirely reasonable and prudent assignment of responsibility

does not become unreasonable merely because the government is the landlord.

B. Legislative History of 1437d(*l*)(6)

The only legislative history concerning § 1437d(*l*)(6) is a statement by the Senate Banking, Housing and Urban Affairs Committee made in connection with the 1990 amendment of the statute. It provides:

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941.[2] On its face, this language could arguably support either side.

However, viewed in the broader context of the United State Housing Act's declared purpose to "vest in local public housing agencies . . . the maximum amount of responsibility and flexibility in program administration," (*See* 42 U.S.C.

---

2 Notably, this Committee report is silent concerning the eviction of household members. This silence further weakens the majority's finding that Congress had an intent on the precise question at issue, a finding necessary to render HUD's allegedly contrary construction of the statute impermissible.

§ 1437 (Declaration of Policy)), the committee report bolsters the conclusion that Congress intended to provide PHAs the widest discretion. A Senate committee's precatory suggestion that eviction of an "innocent tenant" would not be appropriate is but one consideration to be factored by PHAs, with the ultimate decision delegated to the more experienced judgment of the PHA. Were the committee's suggestion meant to be dispositive, there would be no need for PHAs to exercise their "humane judgment."

C. Congress Failed To Amend § 1437d(*l*)(6) To Include an "Innocent Tenant" Defense

Congress's failure to amend § 1437d(*l*)(6) in the 13 years since its passage attests to Congress's intent to provide for strict accountability for those who bring drug criminals onto public housing. Congress was well aware of the criticism directed at the "innocent tenant" eviction provision. Such criticism was expressed directly to Congress. *See e.g.*, Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, S. Doc. No. 101-234, at 90-91 (1989) (associate director of the American Civil Liberties Union argued to Congress: "PHAs should be restrained from imposing the sanction of eviction unless they can prove that a tenant had knowledge and actual control over the actions of a household member or third party."). Criticism was also voiced to HUD in connection with its adoption of implementing regulations. *See* 56 Fed. Reg. at 51,566 (1991) ("Comment by legal aid and by tenant organization... alleges that tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal

conduct, . . . or if the tenant has done everything 'reasonable' to control the criminal activity.").

Despite this criticism, and despite twice otherwise amending § 1437d(*l*)(6) since its enactment, Congress declined to amend the "innocent tenant" eviction provision. This inaction is at least some evidence that Congress intended for, and was satisfied with, the eviction of "innocent tenants."

D. The Eviction of "Innocent Tenants" Does Not Beget "Absurd Results"

The majority contends that § 1437d(*l*)(6) cannot be read to authorize the eviction of "innocent tenants" because such reading would lead to "absurd results," and proffers a few extreme, worse-case hypothetical in support. *See* Pet. App. 21a-23a. It is well-settled that hypothetical application of statutory language is not a valid consideration in statutory construction. *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) ("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme application conceivable, [citations omitted] but will deal with these problems if and when they arise."); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972) ("[P]ossible infirmity in other situations does not render [a statute] invalid on its face.").

Further, as discussed above, the results obtained if "innocent tenant" evictions are permitted are not absurd. To the contrary, they are necessary to protect the health and safety of vulnerable citizens who are precluded from helping

themselves by the very threat of violence § 1437d(*l*)(6) is designed to address.

CONCLUSION

For the foregoing reasons the judgment of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

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Nos. 00-1770 & 00-1781

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL., RESPONDENTS

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amici Curiae* of Lawrence Lessig, John J. Donohue, James Gordley, Gary Blasi, June Carbone, Jo Carrillo, Mary Jane Foran, and Cathy Mosbrucker In Support of Respondents

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Interest of *Amici Curiae*[*]

Amici Curiae are California-based private attorneys and law professors who practice in the State's courts and teach students contract, property, and landlord/tenant law. As are other parties supporting Respondents, *Amici* are troubled by the circumstances giving rise to this case: an attempt to extend an avowedly "harsh" public policy approach to situations where its congressional proponents intended it would not apply – and do so with an indifference to individual considerations that Congress believed would be determinative.

Amici are also particularly concerned by a central theme of Petitioners' legal argument: that the measures defended here are in harmony with common law tradition – and that contract principles provide legal (and moral) authority for the evictions at issue. In fact, as we explain herein, application of common law principles to the idiosyncratic facts of this case would produce precisely the opposite result, precluding eviction of these tenant-Respondents. But equally important, contract and landlord-tenant doctrine, while solicitous of landlords' property rights and responsibilities to other tenants, are also sensitive to tenants' strong interest in continued occupancy and historically skeptical of claims (even those grounded on "consensual" lease terms) that minor or unavoidable lease violations, by tenants dealing in good faith, support termination.

To the extent that the Court addresses the broad statutory questions pressed upon it, it should do so, we believe, with a more balanced and realistic appreciation of this legal context.

Summary of Argument

Because the (limited) record in this case establishes at least

[*]All Parties have consented to the filing of this Brief, Sup. Ct. R. 37.3. It was not authored in any part by counsel for a party, and no party other than *Amici* and their counsel made a monetary contribution for its preparation and submission. Sup. Ct. R. 37.6.

the requisite "reasonable probability" that the tenant Respondents' suit will succeed and because the courts below correctly concluded that the other equitable factors tilt decisively in Plaintiffs' favor (a determination that Petitioners do not ask this court to disturb), the order preliminarily enjoining Petitioner Oakland Housing Authority (OHA) from evicting the tenants should be upheld.

First, although the parties and courts below devoted substantial attention to discussing when, if ever, federal law would permit housing authorities to evict tenants based on drug-related activities of which they are personally "innocent," *Amici* submit that this Court need not – and therefore should not – resolve that difficult and constitutionally sensitive question here. *See Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *Siler v. Louisville & N. R. Co.*, 213 U.S. 175, 193 (1909); *Schenk v. Pro-Choice Network*, 519 U.S. 357, 384 n.12 (1997) (judgment may be sustained on any ground supported by the record).[1] Whatever the characteristics of lease terms and eviction regimes that the Affordable Housing Act, HUD's regulations, and the Constitution might hypothetically allow, ***the leases actually at issue in this case would not support Respondents' eviction***. Rather, a fair-minded reading of those agreements discloses: (1) that an OHA tenant would ***not*** expect eviction based solely on the misconduct of a household member in instances where the tenant had "do[ne] all [she could] to prevent the * * * activity," *see* J.A. 69, and (2) that eviction, in any event, is limited to cases of "serious or repeated" misconduct – not the one-time use of marijuana by teenage grandchildren that gave rise to

[1]Following the District Court, *Amici* will use the term "innocent" to refer to tenants who, like Respondents, did not participate in, know of, or foresee a third party's drug activity and took responsible steps to prevent its occurrence.

OHA's proceedings against Respondents Lee and Hill.[2]

This natural reading of the pertinent agreements, buttressed by blackletter rules requiring that ambiguities in leases be resolved against the drafting party and that forfeiture conditions, in particular, be strictly interpreted, would make eviction impermissible in this case. Indeed, that conclusion is all the more compelling here, given the central importance that Petitioners attach to Respondents' "consent." *See, e.g.*, HUD Br. at 17, 23, 47; OHA Br. at 7-14.

Relatedly, although there is no need for the Court to pass judgment on the hypothetical lease that HUD defends – *i.e*, one that provided "indiscriminately" for eviction of a tenant whenever a family member engaged in drug activity, no matter how insignificant, unforeseeable, far removed from public housing, or inconsequential for other tenants, *see* HUD Br. 33, 40 – *Amici* submit that Petitioners are wide of the mark in suggesting that such arrangements are "frequently" found in residential leases, *id.* at 23. Although leases sometimes include terms imposing a species of vicarious responsibility (for example, providing that the tenant is liable in damages for harm his guests do to landlord property), the "covenant" that HUD describes, where the eviction remedy is available for conduct that neither takes place on the property nor poses any plausible threat to other tenants' interests, is unorthodox. Moreover, when property owners do seek to enforce more usual (*i.e.*, less

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[2]This Brief focuses on the validity of the preliminary injunction as it relates to Respondents Rucker, Lee, and Hill. The District Court grounded its protection of Walker on its view that his Americans With Disabilities Act claim had a fair chance of success – a decision that the Ninth Circuit affirmed and that neither Petitioner asks this Court to review. *See* HUD Br. at 9-10 n.5; OHA Br. at 16 n.7. Also, though HUD notes in passing that the preliminary relief awarded was not confined to the named Plaintiffs' cases, Br. at 9, it mounts no distinct challenge to the injunction on that basis.

sweeping) tenant commitments, courts will duly consider: (1) the parties' respective bargaining power; (2) the strength of the tenant's interest in continued occupancy; (3) the character and severity of the misconduct; (4) the extent of the conduct's foreseeability and of the tenant's knowledge and involvement (if any); and (5) the availability to the landlord of less severe alternative means of achieving its objectives.

Tellingly, these considerations overlap substantially with those highlighted in this Court's recent decisions addressing the constitutionality of regimes that, like this one, seek to use property deprivation to punish or deter disfavored conduct, *see BMW v. Gore*, 517 U.S. 559 (1996); *United States v. Bajakajian*, 524 U.S. 331, 334 (1998); *see also Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring), and protected by the Congress that enacted the statutory provision whose meaning is in dispute. They point to a distinct, narrower ground for upholding the preliminary relief awarded in this case.

Even if these OHA leases were iron-clad in providing for eviction *and* even if the federal law could be construed, as Petitioners and dissenting judges below read it, as declining to give innocence dispositive weight in every case, the statute is not fairly read to authorize eviction of individuals in Respondents' circumstances. Whether or not housing authorities have "discretion" to treat tenant innocence as outweighed in any individual case by other circumstances militating in favor of eviction, the statute ***cannot*** be construed – as it would have to be, to overturn this preliminary injunction – as empowering public landlords to ***ignore*** those traditional, equitable considerations and seek eviction in cases where, as with Respondents', those point uniformly in the opposite direction. Discretionary authority of this latter sort is rare and constitutionally problematic. Congress did not confer it here.

ARGUMENT

I. Contract Principles Do Not Support Evicting Respondents

A. The Parties' Legal Rights Are Determined By The Leases, Not The Federal Statute

Although HUD's characterization of this as a "case involving statutory interpretation," Br. at 18, and its vigorous defense of its regulations are understandable in light of the reasoning of the Court of Appeals, *Amici* submit that the facts and procedural posture of this case indicate a different "starting point," *id.*, for the Court's review. Because the preliminary injunction, by its terms, binds OHA (but not HUD), *see* Pet. App. at 165a-166a, and because it is Plaintiffs' "consent" to OHA's leases (and not the mandates of the federal law, which are directed at public housing *authorities*, not *tenants*) that supplied the claimed basis for the evictions at issue, review should begin with a close examination of the obligations those leases actually impose. Such an analysis discloses an adequate basis for concluding that Plaintiffs have a reasonable probability of success: those leases are fairly read as (a) obliging OHA tenants only to "do all [they] can" to prevent household member involvement in drug activity and (b) limiting OHA's power to terminate tenancy to instances of "serious" misconduct, precluding eviction here. Accordingly, the preliminary injunction may, and under the Court's precedents, should, be sustained on that basis. *See Siler*; *Schenk*; *cf. Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946).[3]

[3]Because the lease interpretation arguments were presented to – though not relied on by – the District Court and because the relevant questions are matters of law (which need only be resolved preliminarily, in any event), there is no barrier to the Court's affirming the judgment on this basis. *But cf.* n.14 *infra* (discussing District Court's ruling that certain State law defenses – but not the contract interpretation defense addressed here – were preempted). Nor is this a case, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 95 (1984), where a defendant's Eleventh Amendment immunity limits injunctive power. *Lynch v. San Francisco Hous. Auth.*, 55 Cal. App. 4th 527 (Cal. Ct. App. 1997) (California housing authorities are not the State for Eleventh Amendment purposes).

B. Respondents Did Not "Consent" To Eviction Under These Circumstances

The fact that Plaintiffs' signatures appear on OHA leases plays a pivotal role in Petitioners' argument to this Court, supplying both the ostensible authority for evicting them and a means of defusing otherwise troubling constitutional difficulties, *see* HUD Br. at 47 (arguing that § 1437d(*l*)(6) "is constitutional because * * * it provides for consensual lease clauses"); *id.* at 17 (characterizing eviction as "enforcement of Plaintiffs' contractual commitment").

At the outset, *Amici* do not agree that tenant consent would in any event have the sweeping significance that Petitioners seek for it. It is, to say the least, unrealistic to describe Respondents as having "made a choice" when they signed their leases. *See* HUD Br. at 46 (asserting that they were "free to find other housing"). They are poor, elderly individuals paying monthly rent in the tens and low hundreds of dollars, whose "option" would be to vacate homes they had inhabited for decades and seek housing in a market where HUD itself estimates "fair rents," to be many times as high. *Compare, e.g.*, J.A. 49 (Rucker's lease, specifying $261.00 monthly rent for four-bedroom apartment) *with* 66 Fed. Reg. 50,032 (Oct. 1, 2001) (determining that "fair market" rent for four-bedroom apartment in Oakland is $2,035.00); *see United States v. Robinson*, 721 F. Supp. 1541, 1543 (D. R.I. 1990) (forfeiture of federally assisted tenant's leasehold "would be, in effect, a

sentence of homelessness"). State law attaches diminished significance to "consent" under such circumstances (especially when the term consented to is itself an unfair one), *see, e.g.*, *Ilkchooyi v. Best*, 37 Cal. App. 4th 395 (Cal. Ct. App. 1995), and it is similarly settled that terms attached to governmental benefits are not insulated from constitutional scrutiny by the fact that a recipient was free to turn down the "offer," *e.g.*, *Frost v. Railroad Comm'n*, 271 U.S. 583 (1926).

1. Under Contract Law Principles, The OHA Leases Do Not Constitute A Tenant's "Warranty" That Household Members Will Refrain From Drug Activity

But there is an even more basic flaw in Petitioners' argument here. The hypothetical lease they seek to defend in this Court – one in which it is accepted that "any" drug activity engaged in by a household member, irrespective of its seriousness or foreseeability or the tenant's efforts to prevent it, can supply the basis for evicting the tenant – ***is not the one*** that the Respondent tenants actually signed with OHA.

The evictions sought here depend primarily on two clauses in Respondents' leases. The first, paragraph 9(m), imposes an obligation to "assure that the tenant, any member of the household, a guest or another person under the tenant's control shall not engage in * * * any criminal activity on or near the premise[s]," J.A. 59. Paragraph 14(d) delimits when the Housing Authority "may terminate tenancy": in cases of "the Tenant's serious or repeated violation of material terms of this lease, such as not making payments due, not complying with paragraph 9, or other good cause." J.A. 64.

Also significant is an instrument, executed contemporaneously with the leases and titled "Tenant Agreement to Maintain A Drug-Free Environment." J.A. 69.

By signing that document, the tenant attests to having been told about OHA and HUD policy regarding drug-related criminal activity, affirms her awareness of paragraph 9(m), and makes the following commitment:

> I agree to comply with the OHA's policy regarding drugs and drug-related criminal activity and to do all I can to prevent the use, sale or possession of drugs in my unit or the involvement in drug-related criminal activity by my household or guests. I also agree to inform all my household members and guests of OHA's policy regarding drugs and drug-related criminal activity.

Id. Because ¶9(m), when considered together with this Agreement specifically setting out tenant obligations concerning drug-related activity, *see* Cal. Civ. Code § 1642 (multiple writings to be considered single contract); *Scudder v. Perce*, 114 P. 571 (Cal. 1911) (specific contract provisions control general ones), is plausibly understood as obliging tenants (only) to "do all [they] can to prevent" others' drug activity, it must be so construed. *See Heston v. Farmers Ins. Group*, 160 Cal. App. 3d 402 (Cal. Ct. App. 1984) (uncertainty in form contract is construed against drafter); *McNeece v. Wood*, 267 P. 277, 284 (Cal. 1928) ("If the agreement can be reasonably interpreted so as to avoid [a] forfeiture, it is our duty to do so").[4]

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[4]It is axiomatic that these and similar rules governing the construction and effect of ambiguous terms "enter into and form part of [every contract], as fully as if they had been expressly * * * incorporated in its terms." *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) (citation omitted).

To the extent that principles requiring deference to administrative constructions of ambiguous statutes, *see Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), have application in a dispute between *contracting parties* concerning the meaning of terms in an agreement between them, they

Unlike the surrounding provisions, which impose straightforward duties "to use the dwelling for private purposes," "to keep the dwelling * * * clean," or "to refrain from scattering rubbish," ¶9(m) asks the tenant "to *assure*" that certain conduct (unrelated to the tenancy) will not occur. Although, to be sure, an "assurance" may mean a warranty – *i.e.*, an undertaking to assume the entire risk that some event outside the party's control will occur – that is not its most common meaning, and it is a singularly implausible one here. As a brief in this case illustrates, the term "assure" is more commonly used to refer to an expressed commitment that increases the listener's confidence that something will or will not happen, not as an absolute guarantee. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) 110. When HUD states that its construction of the statute, if accepted, would enable housing authorities "to *assure* the families who make their homes in public housing that they will have a safe, drug-free environment," Br. at 18 (emphasis added), it presumably contemplates housing authorities' doing *everything reasonably in their power* to make certain that the desired result comes to pass, not their warranting an absolutely safe environment.[5]

Here, tenants who both gave their assurance – in the form of the OHA-drafted "Agreement" – and who fulfilled the

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cannot supercede interpretive rules designed to encourage clear drafting and protect promisors from unfair surprise. A tenant's acknowledgment that she was "told about" HUD regulations by a housing manager, J.A. 69, although conceivably raising case-specific factual questions, does not detract from this general point.

[5]Similarly, when the federal government invoked its "*duty* to provide public * * * housing that is decent, safe, and free from illegal drugs" 42 U.S.C. § 1437b(a)(1), it presumably did not take upon itself legal responsibility for every subsequent "breach."

substantive obligations described therein, "[1] to comply with the OHA's policy * * * [2] to do all [they] can to prevent [others'] drug-related criminal activity * * * and [3] to inform * * * household members and guests of OHA's policy," could justifiably conclude that they had fulfilled their obligations under ¶9(m).[6]

Nor, as is explained more fully below, is it right that a "covenant" of the sort HUD defends would be fundamentally similar to others that appear in tenants' leases with OHA. *See* HUD Br. at 23, 24 (citing, *inter alia*, ¶9(k), which provides that "[t]enant shall pay such charges for * * * repair[s]* * * made necessary by the action(s) or neglect of the Tenant, members of the household or guests" and ¶9(g), which obliges tenants "[t]o keep [the] dwelling unit and such other areas as may be assigned to the tenant * * * in a clean and safe condition," including "causing members of the household and guests" to do so); *see also id.* at 35 (analogizing to liability without fault, citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

The "responsibility" that Petitioners contend that ¶9(m) imposes would be *unlike* those neighboring lease clauses – not because it is indifferent to the tenant's "state of mind," HUD Br. at 30, 33 – but rather because it would not be fairly

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[6]The tenant's undertaking to "cause" desirable behavior by guests and household members must likewise be interpreted in light of its basic parallel with the Agreement. *Compare* J.A. 59 ("the tenant is obligated to comply with * * * and is responsible for causing members of the household and guests to comply with" OHA rules) *with* J.A. 69 (providing that the tenant personally "comply * * * and do all [she] can" to control others). Although the Agreement also asks the tenant to indicate "aware[ness]" that she "may be evicted," on account of a household member's drug activity, *id.*, that acknowledgment is fairly read, in context, as referring to the possibility of eviction based on other parties' conduct *that the tenant has failed to do all that she could to prevent*.

described as addressed to *acts or omissions of the tenant. See Seid Pak Sing v. Barker*, 240 P. 765 (Cal. 1925) (applying "*noscitur a sociis*" maxim in interpreting lease). Unlike a regime of liability without fault – where the defendant is held monetarily liable for damage she *causes*, without further inquiry into motive or negligence – or lease obligations that impose duties relating to the use of the premises the landlord has conveyed to the tenant, the construction of ¶9(m) for which Petitioners argue is as a "warranty," whereby the tenant assumes an "obligation," to see that events that are unforeseeable and outside her control never occur. *Harris v. Klure*, 205 Cal. App. 2d 574 (Cal. Ct. App. 1962) ("interpretation should be avoided which will make the contract unusual, extraordinary, harsh, unjust or inequitable").[7]

Indeed, it may be because such an obligation is so *un*common that Petitioners' Briefs repeatedly resort to the language of culpable *action* in describing OHA's grievance with Respondents. *See, e.g.*, HUD Br. at 16 (describing policies as aimed at tenants who "harbor" "drug criminals"); OHA Br. at 3 (same). *But see, e.g., People v. Ison*, 346 N.W.2d 894, 897

[7]As the District Court recognized, Pet. App. 85a-86a, obligations that relate to the use of the unit inherently incorporate an element of tenant control – both because the tenant can limit access to the unit and also because such duties typically are within the tenant's power to perform himself, if efforts to "cause" others to do so are unavailing.

Nor is the *Haslip* analogy apt: although that decision dealt with a form of "vicarious" (*i.e.*, employer) liability, it involved conduct that, under common law agency principles, *was* that of the corporate defendant. 499 U.S. at 14. Moreover, rules of strict tort liability are grounded on assumptions that it is more just and efficient to shift the costs of injury from the injured party to the party whose actions caused harm. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS (1956). These rationales likely support entirely different rules in a case where the parties are, respectively, a public housing tenant and a government agency.

(Mich. App. 1984) ("intent to encourage, counsel, or assist * * * in evading lawful custody" is element of a harboring offense); *United States v. Foy*, 416 F.2d 940, 941 (7th Cir. 1969).

2. Only "Serious or Repeated" Violations Give Rise To Eviction Under OHA's Lease

But even if it could be concluded that any drug activity by any household member anywhere can be a *violation* of the tenant's ¶ 9(m) obligation to "assure" – and if such an interpretation were constitutionally and statutorily permissible – OHA's lease limits its authority to evict to "*serious or repeated* violations of material terms of this lease, such as not making payments, not complying with paragraph 9, or other good cause." ¶14(d) (emphasis added). Thus, although HUD has taken the position that *the statute* authorizes eviction for "any" household member drug activity – and not merely "repeated or serious"activity, HUD Br. at 33 (citing 56 Fed. Reg. at 51,567) – that is simply not what OHA's agreement with its tenants provides.[8]

[8]Realistically, ¶14(d) can only be read as limiting eviction to cases where breaches of ¶9(m) are "serious or repeated." Because ¶9(m) falls within "paragraph 9," a violation could not constitute "*other* good cause," nor can the lease be read as making "not complying with ¶9" *per se* a "serious * * * violation." Given that ¶9 contains almost all the lease's variegated tenant obligations, such a construction would not only be grammatically doubtful (rendering authority to evict for "repeated" violations superfluous) but, to pronounce every violation of ¶9 "serious" would drain that term of its plainly intended effect as a limitation on landlord power. *See Diversified Realty Group, Inc. v. Davis*, 628 N.E.2d 1081, 1085 (Ill. App. 1991) (similar language in Section 8 lease was "clearly intended to give tenant * * * some measure of objective protection").

Nor can the sentence in ¶14(e) indicating that "Management also considers * * * any drug-related activity on or near such premises by Tenant, members of household, or guests as grounds for termination under this provision" be read as relaxing the restraint of ¶14(d). That statement, made

Whether the "serious[ness]" of a violation of ¶9(m) is to be gauged with reference to the personal culpability of the tenant, *see* ¶14(d) (eviction triggered by "the *Tenant's* serious or repeated violation[s]") (emphasis added), the gravity of the underlying drug activity, or, most reasonably, some combination of both, eviction would be unauthorized here. If the focus is on the tenant's personal culpability, the record, as it stands, establishes that, far from a "serious violation," there was *no* breach of Respondents' assurances to OHA that they would "do all [they could] do to prevent" drug activity. Nothing contradicts their sworn statements (1) that they did not know of, participate in, foresee, or condone the drug activity of their children and grandchildren, and (2) that they acted affirmatively to prevent and warn against drug activity, *see* J.A. 31, 34, 39, 44.

Nor could Plaintiffs fairly be expected to understand that a single incident of marijuana possession by a teenage grandchild was the sort of "serious" misconduct that would terminate their tenancy.[9] *Ticor Title Ins. Co. v. Employers Ins.*, 40 Cal. App. 4th 1699 (Cal. Ct. App.1995) (words of contract are to be understood according to their ordinary and popular meaning). Under federal law, possession of a personal use amount of marijuana is punishable by a civil penalty only, 21 U.S.C. §844a(A). California has gone farther still, "decriminalizing" possession of small amounts, *A & B Cattle*

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in the lease part dealing with *notice*, only confirms that when drug-activity evictions *are* properly pursued (*i.e.*, when the requirements of 14(d) are satisfied), they will be sought on the fast-track, with no more notice provided than the minimum "reasonable under the circumstances."

[9]Neither of the teenagers "ha[d] any prior arrests or other incidents involving marijuana or other drug use or possession." Plaintiffs' Memorandum in Support of Motion For Preliminary Injunction, *Rucker v. Davis*, No. C-98–00781 (N.D. Cal. Apr. 3, 1998) at 25.

Co. v. City of Escondido, 192 Cal. App. 3d 1032, 1042 n.14 (Cal. Ct. App. 1987), to the point where a $100 fine is the maximum punishment for a first offense, Health & Safety Code § 11357(b), and it is *illegal* for an employer to consider a prospective employee's prior record under that statute. Lab. Code § 432.7; *cf. BMW*, 517 U.S. at 583 (measuring excessiveness of punitive damage award by "comparing [it] to civil and criminal penalties that could be imposed for comparable misconduct").[10] According to recent U.S. Government estimates, 76 million Americans – including 43.5% of all 18 year-olds – report having tried marijuana at some point in their lives. *See* http://www.samhsa.gov/oas.[11]

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[10]*Compare also United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1026 (E.D.N.Y. 1991) (noting that under HUD and Justice Department Guidelines, the United States would seek forfeiture under 21 U.S.C. § 881(a)(7) only if a property was an "open and notorious site of drug distribution," where "compelling evidence" establishes "at least two drug felonies," *and* were the leaseholder him- or herself was involved in the criminal conduct). Moreover, even where those stringent conditions were satisfied, the Guidelines provided for "[c]areful consideration" of "factors involving family members of the violator" and required that "[a]ppropriate human resource services support (i.e. child welfare, emergency shelter, etc.) * * * be prearranged where minors or the elderly are [a]ffected," *id.*

[11]Although Rucker's (disabled) daughter was found in possession of cocaine, which local law punishes more harshly than simple marijuana possession, her case implicates a further way in which OHA's actual terms are less stringent than those Petitioners defend. OHA tells tenants that the "One Strike" policy is limited to instances of illegal drug use that "interfere[] with the health, safety, and peaceful enjoyment of the premises by other residents." J.A. 69. *See* HUD Br. at 43 (describing *precisely that limitation* as a "considerably stricter standard for cause for eviction" than the one defended here).

Because proof of "interference" with residents is required, the daughter's "drug activity" – *possession* off premises (the cocaine was discovered during a search incident to arrest for a suspected *alcohol* offense)

Against this background, intimations that these tenants were "harbor[ing] drug criminals," HUD Br. at 16, or allowing their units to become "haven[s] for drug users and dealers," *id.* at 30 – or that their eviction was necessary to "rid public housing projects of those whose tenancy threatens the safety and security of their neighbors," *id.* at 48-49, ring decidedly hollow. *Cf. Hann v. Easton Hous. Auth.*, 709 F. Supp. 605, 609 (E.D. Pa. 1989) (rule against cohabitation by unmarried tenants would "exclude such a large number of people from rental assistance [as to] be unconscionable").[12]

C. Eviction Under These Circumstances Would Not Be "Ordinary"

Even laying aside the peculiarities of the leases that actually gave rise to this case, Petitioners' arguments proceed from another faulty premise: that the (hypothetical) lease terms defended are commonly found in residential leases, and that, if consented to by a tenant, they would, as a matter of contract law, be strictly enforced.

– can not qualify. *See Decatur Hous. Auth. v. Brown*, 349 S.E.2d 501, 503 (Ga. App. 1986) (sustaining conclusion that "the mere violation of marijuana possession even on two occasions [neither] creates a hazardous situation for other tenants nor interferes with their peaceable possession"); *accord Jersey City Hous. Auth v. Jackson*, 749 F. Supp. 622, 633 (D. N.J. 1990); *see also Boston Hous. Auth. v. Bryant*, 693 N.E.2d 1060 (Mass. App. 1990).

[12]Both Petitioners fault the decision below for considering factual situations other than those actually before the court in construing the statute. But their own Briefs strain visibly to assimilate the misdemeanor conduct that gave rise to this case to that which impelled Congress to act. For example, rather than quote directly the congressional finding that "*drug dealers* are increasingly imposing a reign of terror," (emphasis added), HUD (perhaps mindful of the absence of drug dealing allegations from this case) describes Congress's having found a "'reign of terror' caused by the presence of drug *criminals*," Br. at 44 (emphasis added).

Although *Amici* cannot represent that such a "covenant" is without precedent, the very features that HUD defends – forfeiture based on third-party conduct, however minor, that is unforeseeable and outside tenant's control, that in no way relates to the unit itself, and poses no genuine threat to other tenants' health, safety or property interests, *See* Br. 33, 40 – are *unlike* the examples they cite as analogous, uncommon in *Amici*'s experience, and in derogation of both historic and modern rules of landlord-tenant law. *See, e.g.*, R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD & TENANT (1980) (at common law, lessor had little control of tenant's use of property); Minn Stat. § 504B.171 (imposing uniform lease covenant against "allow[ing] controlled substances in th[e] premises," but limiting violations to cases where tenant "knew or had reason to know of [third-party's possession]").

Although tenants are routinely held (financially) *liable* for damage done to leased premises, including by guests and family members, and can be subject to eviction for using a landlord's property in a way that threatens harm to others, it is *not* "common" for a lease to provide for eviction for an isolated illegal act, *see* Restatement (Second) of Property § 12.5 comment c, especially a minor one, *Rowe v. Wells Fargo Realty Servs., Inc.*, 166 Cal. App. 3d 310, 319 (Cal. Ct. App. 1985) (declining eviction for commercial tenant's "minor regulatory violation") – let alone to regulate tenant conduct that is off-premises and unrelated to his tenancy. *Machias Hotel Co. v. Fisher*, 56 Me. 321 (1868) (refusing to terminate lease of defendant convicted of selling intoxicating liquor off-premises); *64 Park Ave. Corp. v. Blum*, 78 N.Y.S.2d 818 (Sup. Ct. App. Term 1943) (lease provision has "no application to conduct or acts committed off the demised premises"); *Richmond Tenants Org., Inc. v. Richmond Redev. & Hous. Auth.*, 751 F. Supp. 1204, 1206 (E.D. Va. 1990) (prohibiting eviction for off-

premises alcohol misconduct, because "it is unreasonable to make misdemeanors, even if repeated, grounds for eviction, when the offense bears no relation to the housing development"); *see also* R. SCHOSHINSKI § 6.1 at 377 (at common law, damages provided sole remedy for lessee's breach of covenant).[13]

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[13]HUD's suggestion that evictions (of whole families) for single minor infractions off premises are protective of "health and safety," on the ground that individuals who engage in such are "not unreasonab[ly]" presumed likely to commit anti-social acts *on premises*, Br. at 45, runs the nuisance analogy into the ground. Jurisdictions that try seriously to tie evictions to ongoing danger require a far greater showing than HUD could make in these cases. *See Tenement House Dep't v. McDevitt*, 109 N.E. 88 (N.Y. 1915) (Cardozo, J.); *cf. Spence v. Gormley*, 439 N.E.2d 741, 750 (Mass. 1982) (acknowledging that eviction even for violent conduct is unnecessary if the offending individual has subsequently been incarcerated).

As did the dissent below, Petitioners have invoked a litany of justifications for a policy of the sort they defend. At least one of the stated objectives – deterring potential drug criminals with the threat that their innocent relatives will suffer forfeiture, far from being "worthwhile," HUD Br. at 36, is constitutionally pernicious. *See Weber v. Aetna Casualty & Surety* Co., 406 U.S. 164, 175 (1972); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (however "expedient," acting against children for parents' wrongdoing was unconstitutional). A second rationale – enhancing housing authority "bargaining power" to "obtain [a tenant's] agreement" HUD Br. at 36, to sanctions short of eviction – is puzzling. The same objective surely could be accomplished without ever dropping the Damoclean sword on innocent individuals: *e.g.*, with a lease term providing, in substance, "tenant agrees with all steps (short of eviction) that landlord proposes to deal with drug activity."

Finally, assertions about the "enormous" difficulty of proof, HUD Br. at 35-36 are, at the least, overwrought. While the argument seems to assume that housing authorities would be confined to relying on direct evidence, even in a criminal prosecution – where proof beyond a reasonable doubt is required – "all elements * * * can be proven by * * * circumstantial evidence." *United States v. Poole*, 878 F.2d 1389, 1391-92 (11th Cir. 1989); *see id.* ("Evidence of surrounding circumstances can prove knowledge.

And the assumption that eviction would proceed on the ground that "a deal is a deal" fails to do justice to the contract principles that Petitioners insist should govern. First (even in the absence of ambiguities), it is settled law that not every breach of a contractual term will be considered "material," and courts considering contract claims will hold a promissee's obligations satisfied by substantial performance, *See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (Cal. Ct. App. 1987) ("The law sensibly recognizes that * * * not every breach justifies treating the contract as terminated") (citations to Restatements and treatises omitted); *Keating v. Preston*, 108 P.2d 470 (Cal. Ct. App. 1940) (violation of implied covenant not to use premises for gambling was so "slight and trivial * * * that it does not constitute ground for terminating the lease"); Restatement (Second) of Contracts § 241 (in deciding whether breach is material, court should consider, *inter alia*, whether promisor fulfilled duty of good faith and fair dealing and "extent to which the party failing to perform * * * will suffer forfeiture").

And the notion that a contracting party will not be liable for breach of a condition when the reasons for nonperformance were unforeseeable and beyond her control is not an innovation of the district court in this case: it is a staple of contract law. *See* Restatement (Second) of Contracts § 265; *cf. McNeece*, 267 P. at 285.

Further, a tenant's "consent" to subject herself to eviction for a grandchild's minor, harmless and unforeseeable

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[P]ossession * * * can be established by showing ownership or dominion and control over the drugs or over the premises on which the drugs are concealed. Intent to distribute can be proven circumstantially from * * * the quantity of [drugs] involved"); *see also Spence v. O'Brien*, 446 N.E.2d 1070 (Mass. App. 1983).

misdemeanor – the "bargain" HUD hypothesizes – would not necessarily be given conclusive effect. The fact of consent does not preclude a court from inquiring whether a contract or a particular term is unconscionable, especially where the parties' bargaining power is, as here, highly unequal. *See* Civ. Code §§ 1567, 1670.5 (on finding clause unconscionable, court may "limit [its] application * * * [so] as to avoid any unconscionable result"); *Leonedas Realty Corp. v. Brodowsky*, 454 N.Y.S.2d 183 (Civ. Ct. 1982) (holding "singles only" lease provision unconscionable, citing county's 2% vacancy rate).[14]

Principles of contract interpretation also foreclose enforcement of even agreed-to penalty clauses. *See, e.g., Perdue v. Crocker Nat'l Bank*, 702 P.2d 503 (Cal. 1985); Cal. Civ. Code § 1671. Resistance to such clauses is grounded not only on considerations of fairness, but also on recognition that

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[14]The District Court ruled, erroneously in our view, that a California law unonscionability defense would be preempted here, *see* Pet. App. at 81a-82a. At the outset, a court would not be applying "contract principles" were it to hold those rules "preempted" in any instance where their neutral application would operate to defeat eviction. *See Cincinnati Metro. Hous. Auth. v. Harris*, 1983 WL 8893 (Ohio App. June 15, 1983) ("when a public housing agency * * * uses the courts of this state to enforce a remedy made available by the state, *viz.*, forcible entry and detainer * * * it subjects itself to those powers, legal and equitable, which state law reposes in its courts with respect to such actions"). Congress did not expressly provide for preemption, and there is no actual conflict between a provision that requires inclusion of lease terms – but does not "require[] or encourage[] * * * terminations," 66 Fed. Reg. 28,782, and a court's applying contract or equity principles in any particular case. Although it is conceivable that a State common law rule could so frustrate Congress's aim of ending drug dealers' "reign of terror" in public housing as to warrant preemption, congressional purposes are furthered, not disserved by exercises of judicial discretion. *See infra*. *But see City of South San Francisco Hous. Auth. v. Guillory*, 41 Cal. App. 4th Supp. 13 (Cal. Super. App. 1995) (giving very broad preemptive effect to federal law).

parties do not always expect the penalties to be imposed, *Steele, v. Branch*, 40 Cal. 3, 11 (1870), and concern that they not have perverse incentives to seize on minor breaches, *see Ross v. Gulf Oil Corp.*, 522 A.2d 97 (Pa. Super. 1987).

Essentially similar concerns inform the traditional reluctance to enforce forfeiture conditions in leases. *See, e.g.*, Cal. Civ. Code § 1442. Not only are such claims scrutinized under an especially rigorous version of the rule of construction against the drafter, *see Miller v. Reidy*, 260 P. 358 (Cal. Ct. App. 1927) ("[h]e who claims a forfeiture must have closed every avenue of escape to his opponent"), but courts asked to impose a forfeiture will be more willing to overlook minor violations, *Steele*, 40 Cal. at 11 ("the law abhors a forfeiture, and therefore will ordinarily be satisfied with a substantial compliance of a [forfeiture] condition"), and will refuse to impose [] forfeiture if the landlord's legitimate interests could be served through a less drastic remedy. *See Powell v. Franco*, 684 N.Y.S.2d 226 (App. Div. 1999); *1021-27 Ave. St. John Housing Dev. Fund Corp. v. Hernandez*, 584 N.Y.S.2d 990 (Civ. Ct. 1992) (noting authority distinguishing between "cases which warrant the forfeiture of the subject premises [and] those which have fashioned relief other than forfeiture"); *see also Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554, 561 (Ohio. App. 1992) ("Ohio courts have the power, and often exercise it, to relieve a tenant from the consequences of forfeiture"); *Mid-Northern Mgmt, Inc. v. Heinzeroth*, 599 N.E.2d 568, 572 (Ill. App. 1992) (similar).

Whether such judicial intervention is considered an exercise of equitable power or enforcement of a legal rule implied in every contract, it would likely rule out eviction here, even if tenants' leases were as HUD has assumed them to be. *See Knight v. Black*, 126 P. 512 (Cal. Ct. App. 1912) ("the very nature of the action, involving, as it does, a forfeiture, appeals

to the equity side of the court, and * * * requires a full examination of all of the equities involved to the end that exact justice be done"); *McNeece*, 267 P. at 285 ("it would * * * appear to be highly inequitable to forfeit the lease on account of one act of unlawful possession on the part of the employee of the sublessee in the absence of some notice or knowledge of the infraction of the law on the part of the lessee or his subtenant").[15]

Finally, although there is no need to settle this case on constitutional grounds, it bears emphasis that these common law and equitable considerations converge substantially with concerns articulated in recent decisions of this Court construing

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[15]The punishment sought here is in gross disproportion to the wrong, however described. In strictly economic terms, Respondents' housing subsidies are worth thousands of dollars. *See Carroll v. Housing Opportunities Comm'n*, 510 A.2d 540, 545 (Md. 1986). But the less quantifiable effects of being evicted from one's home of thirty years – being uprooted from work and childcare arrangements, friends and family – can be equally serious. Finally, poor families – stamped with the stigma of drug eviction – face almost insurmountable odds in tight housing markets. *See* E. Lindblom, *Preventing Homelessness*, HOMELESSNESS IN AMERICA (J. Baumohl, ed. 1996) at 189 (stressing link between evictions and family homelessness).

Although Petitioners suggest that the policies amount to little more than a routine reallocation of a scarce governmental resource (housing assistance) – from "drug criminals" to "some of the numerous households [on waiting lists] who would not pose a similar threat," *see* HUD Br. at 16 – that line of argument is unworthy of Petitioners. Even putting aside empirical doubts that new tenants (and grandchildren) will – whatever assurances they give – prove more able to live up to the Government's standards of rectitude than those evicted, there can be no equivalence, from a tenant's standpoint, between being evicted and failing to more swiftly climb a waiting list for desired housing. *But see* OHA Br. at 43 (analogizing eviction in these cases to "recission," where tenant is "return[ed] * * * to as good a position as that occupied * * * before the contract was made").

the Due Process Clause. For example, *BMW*, in determining that a jury's punitive damage award was so "grossly excessive" as to offend the Constitution, identified these guideposts: "the degree of reprehensibility of the [tort]"; "the disparity between the [punishment and] the harm or potential harm [the tort caused]; and the "difference between this remedy and civil penalties authorized or imposed in comparable cases." 517 U.S. at 574-75; *see also id.* (explaining that degree of reprehensibility, "perhaps the most important indicum of reasonableness of punitive damages," is "associated with" physical, as opposed to economic, injury; intentional, rather than careless, wrongdoing; and recidivism – *i.e.*, "repeatedly engag[ing] in conduct, knowing or suspecting that it was unlawful"). They are precisely the same sort of considerations that Petitioners in this case insist housing authorities may freely ignore when making eviction decisions. *See infra*; *but see Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring) (identifying State courts' consideration of individual equities as "key" to decision and suggesting that suspension of equitable limitations would raise distinct Due Process concerns).[16]

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[16]Similarly, the recently enacted Civil Asset Forfeiture Reform Act, Pub. L. 106-185, requires the U.S. government to establish a "substantial connection between the property [forfeited] and the offense," *see Bennis*, 516 U.S. at 454 (Thomas, J., concurring), and protects from deprivation under "any civil forfeiture statute," the property interests of innocent owners – including those who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property," 18 U.S.C. § 983(d)(2)(a). *See also id.* § 983 (d)(2)(B) (prohibiting forfeiture of property acquired from wrongdoing spouse if forfeiture "would deprive [innocent spouse] of the means to maintain reasonable shelter in the community for [that spouse] and all dependents residing with [him or her]").

II. The Statute Is Not Reasonably Construed As Authorizing Respondents' Eviction

For the reasons explained above, this case does not require this Court to resolve the constitutionally sensitive questions of federal statutory interpretation that divided the court below. In view of the actual lease terms and specific procedural posture, even an opinion accepting *in toto* HUD's construction of the statute would not impeach the propriety of the preliminary injunction. *See Chevron*, 467 U.S. at 842 ("[T]his Court reviews judgments, not opinions").

But even if these peculiarities did not threaten to make an opinion construing the statute largely advisory in character, the Court may and should sustain the preliminary injunction, without addressing the broad question that HUD strenuously presses upon it, *i.e.*, whether the Affordable Housing Act must be construed (as it largely was by the appeals court majority) as making tenant innocence an *absolute bar* to drug-activity eviction.

While there is compelling support, *Amici* submit, for that construction of the statute, the order preliminarily enjoining Respondents' eviction did not rest on that ground and it needs no such broad rule of law in order to be sustained.[17] Rather, the outcome-determinative legal question here is more narrow: whether, as Petitioners maintain, housing authorities (and courts) are at liberty to *ignore* innocence and other relevant individual circumstances in opting to pursue eviction.

Indeed, the sharp wording of the opinions below should not obscure important ways in which the meaning of § 1437d(*l*)(6)

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[17]In its preliminary injunction ruling, the district court *declined* to recognize a categorical innocent tenant defense, extending to drug activity that occurred inside tenants' apartments. Pet. App. 166a.

is not open to genuine dispute. First, there can be no real disagreement that cases such as Respondents' fall far from the core concerns that led to enactment of the provision. The congressional finding that framed this provision refers to a "reign of terror" imposed by "drug *dealers*," 42 U.S.C. § 11901(3) (emphasis added), and President Clinton's message calling for a "One Strike" initiative similarly reasoned that residents who "peddle drugs" (not those who use them – let alone the grandparents of those individuals) should be evicted, *see* 32 Weekly Comp. Pres. Documents 584, 585 (Mar. 28, 1996); *Bajakajian*, 524 U.S. at 323 ("Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader"); *cf.* OHA Br. at 3.

Second, it is common ground that Congress did not contemplate – and the statute does not require – eviction of every tenant with a household member who has engaged in drug activity. *See* HUD Br. at 20-21 (under HUD's construction "Section 1437d(*l*)(6) requires [a certain lease provision] * * * * not that the public housing authority must invoke that clause and terminate tenancy in all cases – or in any particular case – of drug-related criminal activity").[18]

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[18]HUD's confidence that housing authorities, if left to their own devices, would have "[l]ittle incentive," Br. at 45, to evict inequitably seems unfounded. First, housing authorities have a *direct financial incentive* to maintain an aggressive eviction program: HUD's funding formula. *See* 24 C.F.R. § 901.45(c) (providing for grading down for failure "to document results in appropriately evicting" under lease term). Moreover, as Petitioner's Brief stresses, *id.* at 16, housing authorities' waiting lists contain many tenants who – if no less likely to have children or grandchildren who will at some time smoke marijuana, *see supra* – are more "desirable" to the Housing Authority in other ways, including their ability to pay rent. *See* 42 U.S.C. § 1437n; *id.* § 1437n(a)(3)(B)(ii) (authorizing incentives for higher income tenants "to occupy dwelling unit in projects predominantly occupied

Nor is there any fundamental disagreement as to the particular factors that bear on the (in)appropriateness of eviction in any individual case – or that innocence is (at least) prominent among them. The most recent version of HUD's regulations explains that denying *dispositive* weight to a tenant's innocence does not mean that the PHA should not

> consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effect that eviction would have on family members not involved in the prescribed activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the action.

24 C.F.R. 966.4(*l*)(5)(vii)(B); *see also id.* (noting availability of remedies short of evicting innocent family members); H. R. Rep. 101-559 (1990) (enumerating similar factors). The Senate Committee described the provision as "mak[ing] criminal activity grounds for eviction of public housing tenants *if* that action is appropriate *in light of all the facts and circumstances*," S. Rep. 101-316 at 179 (1990) (emphasis added), further explaining that eviction "would not be the appropriate course, if the tenant had no knowledge of the criminal activities of his/her guests or had taken responsible steps under the circumstances to prevent the activity." *id.*

Finally, there can be no real disagreement that individualized consideration of these factors in Respondents' cases would strongly militate against eviction, and in the cases

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by * * * families having lower incomes").

In any event, an argument that discretion will seldom be abused is not an argument against independent review for abuse – or against granting relief when it has been.

of Lee and Hill – tenants of longstanding, "charged" with having teenage grandchildren who, on a single occasion, possessed marijuana outside their apartments – the question would not even be a close one. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997) (even unambiguous statutory words will be disregarded if they will produce a "glaringly unjust result").[19]

Accordingly, Petitioners' attack on the lawfulness of the preliminary injunction depends less on the tenability of their contention that Congress conferred some "discretion" to evict tenants who are not individually culpable, than on their establishing that the statute conveyed authority of a very different sort: "discretion" to *disregard* innocence and evict in cases where that and every other individual circumstance would make eviction *in*appropriate.

Whether or not Congress intended to confer the former sort of authority, this statute simply may not be read as conferring "discretion" of the second, highly unusual kind. *See Kickapoo Tribe v Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) ("The exercise of discretion contemplates reasoned decision making on the basis of relevant and appropriate considerations to the task at hand"); *Allegheny County Hous. Auth. v. Hibbler*, 748 A.2d 786, 790 (Pa. Comm. Ct. 2000) (affirming judgment

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[19]Although Rucker's case presents different and arguably less starkly one-sided equities, her eviction was plainly unauthorized by the lease, and as Petitioners note, OHA has opted not to pursue a termination in her case.

HUD asks the Court to "presum[e]," Br. at 8, that OHA's decision to discontinue proceedings against Rucker is proof that OHA is appropriately exercising its discretion under the statute, but there is *no evidence* in the record that even that decision – let alone the decisions to *go forward* against Hill and Lee – was "based on a consideration of the factors enumerated by HUD." *See* OHA Br. at 45 (asserting that discretion was exercised in Walker's and Rucker's cases).

denying eviction on ground that the "housing authority must consider all circumstances, including mitigating circumstances, when deciding whether to evict").

Not only did Congress identify the relevant factors, but it was not silent as to the necessity of individualized consideration. The House Committee stated that the eviction decision "should require the consideration of all facts and circumstances," and the Senate Committee described § 1437d(*l*)(6) as "making criminal activity grounds for eviction of public housing tenants *if* that action is appropriate *in light of all the facts and circumstances*," S. Rep. 101-316 at 179 (emphasis added); *see also id.* 179 ("eviction would not be the appropriate course * * * if the tenant had * * * taken responsible steps under the circumstances to prevent activity"). Although HUD, *see* Br. at 44, creatively distinguishes between what Congress thinks is "appropriate" under a statute and what it authorizes, such a distinction does not help where, as here, the same term – "appropriate" – is used to describe when, *under the statute*, criminal activity is "grounds for eviction."[20]

To allow eviction of individuals in Respondents' circumstances – in the teeth of the compelling individual equities (and this clearly expressed congressional intent) to the contrary – would be at least an unreasonable interpretation of

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[20]HUD also argues that the Senate Bill was "quite different" from the legislation enacted. Br. at 43. But the difference identified *has nothing to do with the tenant's culpability* – relating instead to the entirely distinct factor of the gravity of the household member's conduct (the Senate version having expressly limited eviction to cases where drug activities "threaten the heath or safety of, or right to quite enjoyment of the premises by, other tenants"). OHA's attempt to blunt the force of the Senate Committee language is less elegant: it simply changes "*would not* be appropriate" to "might not be," Br. at 19.

the statute, and quite probably an unconstitutional one. The deprivations that Petitioners seek to effect are not only far from the heartland of congressional concern, but they would represent a troubling deviation from the Nation's forfeiture tradition. Unlike governmental actions that this Court has held to be historically sanctioned, Respondents' leasehold was not "used" in the commission of the (misdemeanor) offenses. *See generally Bennis*, 516 U.S. at 455 (Thomas, J., concurring) (in constitutional challenge by an innocent owner, strict adherence "to historical standards for determining whether specific property is an 'instrumentality' of crime" is appropriate). And while construing the statute as authorizing action against innocent individuals would in itself raise serious constitutional difficulties, *see Solid Waste Agy. v. U.S. Army Corps of Engineers*, 531 U.S. 139, 172 (2001), reading it as authorizing complete disregard for innocence (and other similarly relevant factors) would almost surely place it on the other side of the constitutional line. *Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring).

Moreover, although Petitioners make an awkward case that some housing authority discretion can, *as a logical matter*, coexist with the "innocent owner" defense made available when the federal government seeks forfeiture of the same public housing leasehold based on the same drug activity, *see* HUD Br. at 28-29, reading the statute to authorize complete disregard of individual circumstances would not fulfill the judicial responsibility "to make sense, rather than nonsense out of the *corpus juris*." *West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 100 (1991). Even if the U.S. Code did not provide an innocent public housing tenant with quite as much protection as an innocent owner of other property – or even with as much protection as another public housing tenant against whose property the United States, rather than a housing authority, has

elected to move – it must be read to minimize the danger that less blameworthy individuals, whose property is less closely connected to less serious criminal activity will suffer greater dispossession.[21]

Finally, even if it were somehow construed as vesting housing authorities with unusually broad discretion to *seek* eviction, the statute simply cannot be construed as divesting the judiciary of power to exercise independent judgment, as a matter of equity or State law, and deny the drastic remedy the public landlord sought. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the

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[21]Efforts to distinguish the lease forfeiture and eviction provisions, which originated in the same subtitle of the same statute, Pub. L. 100-690, Subtitle C, based on the differing identities or "capacities," Br. at 29-30, of the governmental entities seeking forfeiture – or the differing "procedural protections" involved – do not stand up to close scrutiny. To begin with, the *purposes* of the two regimes overlap substantially: the government's "law enforcement capacity," HUD Br. at 29, is not obviously different from housing authorities' asserted interest in "deter[ing] drug-related criminal conduct," *id.* at 36, and "protecting the security of the housing project." Moreover, the re-written forfeiture statute has imposed a higher burden of proof and has provided specific hardship-based protection for "residences" of spouses of individuals against whom the Government proceeds. Thus, under HUD's construction, the spouse of a notorious drug felon has greater protection against displacement than would a public housing tenant who has done all that she can to prevent her grandson's one-time use of marijuana.

Similarly, although Petitioners discuss the former provision allowing for admission to public housing of individuals who were evicted on account of family member drug activity, *see* 42 U.S.C. 1437d(c)(4)(A)(iii)(1994), solely as proof that Congress must have contemplated eviction of some innocent tenants, they overlook a much more basic substantive embarrassment: it would be fundamentally irrational for Congress to have provided that the same families who would, under Petitioners' reading, be routinely evicted from public housing would promptly be entitled to preference on seeking readmission.

court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied); *see also City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). To say the least, the statute does not include the clear congressional statement necessary to accomplish that unusual and disfavored result, and the pertinent legislative history is, once more, specifically and explicitly to the contrary. *See* S. Rep. 101-316 at 179 (indicating that "each case will *require* the wise exercise of humane judgment by * * * the eviction court") (emphasis supplied).

Conclusion

Because there is no basis for disturbing the lower courts' conclusions that the prerequisites for preliminary injunctive relief have been established in this case, the judgment should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and OAKLAND HOUSING AUTHORITY and HAROLD DAVIS,
Petitioners,

v.

PEARLIE RUCKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND, CALIFORNIA ALLIANCE AGAINST DOMESTIC VIOLENCE, (CONTINUED ON INSIDE FRONT COVER) IN SUPPORT OF RESPONDENTS

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Kansas Coalition Against Sexual and Domestic Violence,
Kentucky Domestic Violence Association,
Michigan Coalition Against Domestic and Sexual Violence,
Minnesota Coalition for Battered Women,
National Training Center on Domestic and Sexual Violence,
Nebraska Domestic Violence Sexual Assault Coalition,
New Hampshire Coalition Against Domestic and Sexual Violence, New Jersey Coalition for Battered Women,
New Mexico Coalition Against Domestic Violence,
New York Coalition Against Domestic Violence,
North Carolina Coalition Against Domestic Violence,
Ohio Domestic Violence Network, Oklahoma Coalition Against Domestic Violence and Sexual Assault,
Pennsylvania Coalition Against Domestic Violence,
Rhode Island Coalition Against Domestic Violence,
Sojourn Services for Battered Women and Their Children,
South Carolina Coalition Against Domestic Violence and Sexual Assault,
Vermont Network Against Domestic Violence and Sexual Assault,
Washington State Coalition Against Domestic Violence,
West Virginia Coalition Against Domestic Violence,
Wisconsin Coalition Against Domestic Violence,
and Wyoming Coalition Against Domestic Violence and Sexual Assault

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INTEREST OF AMICI CURIAE

National Network to End Domestic Violence, National Network to End Domestic Violence Fund, California Alliance Against Domestic Violence, Alaska Network on Domestic Violence and Sexual Assault, Arizona Coalition Against Domestic Violence, Colorado Coalition Against Domestic Violence, Connecticut Coalition Against Domestic Violence, Delaware Coalition Against Domestic Violence, District of Columbia Coalition Against Domestic Violence, Hawaii State Coalition Against Domestic Violence, Kansas Coalition Against Sexual and Domestic Violence, Kentucky Domestic Violence Association, Michigan Coalition Against Domestic and Sexual Violence, Minnesota Coalition For Battered Women, New Hampshire Coalition Against Domestic and Sexual Violence, New Jersey Coalition For Battered Women, New Mexico Coalition Against Domestic Violence, New York State Coalition Against Domestic Violence, North Carolina Coalition Against Domestic Violence, Ohio Domestic Violence Network, Oklahoma Coalition Against Domestic Violence and Sexual Assault, Pennsylvania Coalition Against Domestic Violence, Rhode Island Coalition Against Domestic Violence, Sojourn Services, South Carolina Coalition Against Domestic Violence and Sexual Assault, Vermont Network Against Domestic Violence and Sexual Assault, Washington State Coalition Against Domestic Violence, West Virginia Coalition Against Domestic Violence, Wisconsin Coalition Against Domestic Violence, and Wyoming Coalition Against Domestic Violence and Sexual Assault ("*amici*") submit this brief in support of Respondents.* The interest of *amici* are described in the Appendix to this brief.

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* Pursuant to Sup. Ct. R. 37.3(a), all parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* state that no

SUMMARY OF ARGUMENT

Battered women and their children are evicted from their homes by landlords who blame them for the violent acts of their abusers. This should not happen, especially in public housing, where federal laws aim to protect victims of crime -- and victims of domestic violence in particular. Congress did not authorize or intend the absurd result of punishing victims. But it does happen, too often.

Strict liability and "zero tolerance" policies, such as the "One Strike" public housing policy, present a terrible dilemma for victims of violence: endure in silence or lose your home. Strict liability policies blame -- indeed, punish -- the victims and the children of victims of violent crime. They are not authorized under the Housing Act. They contravene numerous Congressional enactments seeking to provide services to battered women. Moreover, when applied to victims of domestic violence, they overwhelmingly affect women, and therefore may violate federal anti-discrimination law.

For these reasons, the Court of Appeals for the Ninth Circuit correctly limited the application of federal law and its decision should be AFFIRMED.

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counsel for any party authored this brief in whole or in part and no person or entity, other than *Amici Curiae*, its members, or its counsel, made a monetary contribution to the preparation of this brief.

ARGUMENT

> Veronica Maffeo was beaten up by her ex-boyfriend in her Boston apartment. She obtained a restraining order against him. He was arrested, prosecuted, and convicted for assault and battery. Her landlord sought to evict her because she caused a disturbance when she screamed for help while she was being attacked.[1/]

I. INTRODUCTION

Petitioners argue that 42 U.S.C. § 1437d(l)(6) sweeps broadly to include "any criminal activity that threatens the health, safety, or right to peaceful enjoyment" of housing by others that is committed by "the tenant, any member of the household, a guest, or another person under the tenant's control." Such an interpretation is absurd in the extreme, authorizing even the eviction of victims of crime under a statute expressly enacted to protect the innocent. Many public housing authorities and private landlords nevertheless interpret the statute under "one strike" or "strict liability" policies to threaten victims of violence.

Landlords relying on this mistaken statutory interpretation evict innocent and often injured women and children who are victims of domestic assault. These practices are not authorized by the plain language of the statute, in its legislative history, or with reference to the numerous other Congressional enactments addressing the needs of battered women and their children. Strict liability

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[1/] *See* Def.'s Mot. to Vacate J., New Trial, *Weston Assoc. v. Veronica Maffeo* at ¶ 4 (Hous. Ct. Dep't, Boston Div., filed Sept. 2001) (Docket No. 01-SP-03935).

policies used to evict victims of domestic assault in fact discriminate against women in violation of federal law.

For these reasons, the Court of Appeals for the Ninth Circuit correctly found that 42 U.S.C. § 1437d(l)(6) does not authorize evictions if "the tenant has taken reasonable steps to prevent" the criminal activity and the tenant "could not realistically exercise control of the conduct of the household member or guest . . . ." *Rucker v. Davis*, 237 F.3d 1113, 1129 (9th Cir. 2001). This is the only lawful construction of the statute. A statutory interpretation by the Department of Housing and Urban Development ("HUD") and local housing authorities that assumes guilt and authorizes the eviction of innocent tenants only serves to punish the victims of crime. That approach is contrary to law.

II. "ONE STRIKE" EVICTION POLICIES BLAME AND PUNISH BATTERED WOMEN AND THEIR CHILDREN AND COMPOUND A NATIONAL CRISIS

Domestic violence is a terrifying reality for women and children across the country.[2/] Millions of women are physically abused by their husbands or partners each year.[3/]

[2/] This brief focuses on violence against women because the victims of domestic violence and sexual assault are nearly always women. *See infra*, notes 49-53 and accompanying text. The United States Department of Justice estimates that 85% of reported assaults on partners or ex-partners are committed by men against women. Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, *Intimate Partner Violence at* 1 (2000). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 891 (1992) (describing incidence of violence against women and children).

[3/] *See* Patricia Tjaden & Nancy Thoennes, Nat'l. Inst. of Justice, *Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* at 2, 7

The effects of domestic violence are severe. Physical injuries such as shattered bones, scratches, bruises, and burns are only the most visible consequences. Victims of domestic violence also miss work due to their injuries and can ultimately lose their jobs as a result of the violence committed against them. Battered women can also have trouble finding homes due to poor credit, rental and employment histories resulting from their abuse.[4/]

As hard as it is to believe, battered women and their children are evicted from their homes under "One Strike" policies only because they have been abused. Landlords interpret regulatory and contractual provisions -- such as the "One Strike" rule -- to authorize eviction when any crime or violence occurs in or near a home. All too frequently, victims are blamed and punished for crimes committed against them. Landlords make these decisions because of a lack of understanding about domestic violence, outright prejudice, or fear.

Imagine being attacked in your home and later being told that you violated the lease because your attacker

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(1998). In fact, the National Institute of Justice reported that 5.9 million assaults are perpetrated against women annually. *See id.* at 11. *See also United States v. Morrison*, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) (citing estimate of four million women assault victims every year).

[4/] *See* Susan A. Reif & Lisa J. Krisher, *Subsidized Housing and the Unique Needs of Domestic Violence Victims*, Clearinghouse Rev. 20 (May-June 2000). In addition to the personal toll, the cost of domestic violence to society is also substantial. It has been reliably estimated that family violence costs the nation from $5 to $10 billion annually in medical expenses, police and court costs, shelters and foster care, sick leave, absenteeism, and non-productivity. *See Morrison*, 529 U.S. at 635 (citing S. Rep. No. 103-138, at 41 (1993)).

"substantially annoyed and endangered *other* residents."[5/] Or because your ex-husband entered your home, threatened you, and then shot himself.[6/] Or because your boyfriend assaulted you in your home.[7/] After suffering at the hands of an attacker, becoming bloodied, bruised and possibly hospitalized, you could be evicted simply because you were victimized:

- Chanell Tanzy received twelve stitches in her right arm after her boyfriend assaulted her. She also received an eviction notice. A judge sided with the landlord evicting Ms. Tanzy, saying Ms. Tanzy was responsible for any criminal activity that occurred in her apartment, including domestic violence.[8/]

- Theresa Taylor tried to keep her ex-boyfriend out of her Louisville apartment. He had been in jail for violating a court-issued civil protection order directing him to stay away from her. Taylor told him he wasn't supposed to be there, but he pulled a gun

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5/ *Steven Scott Management, Inc. v. Steven Rayfield Scott and Carol Norman*, C7-98-2024, 1999 WL 366596, at * 1 (Minn. Ct. App., June 8, 1999) (dismissing an unlawful detainer action brought against batterer and victim and evicting batterer) (emphasis supplied).

6/ Darla Carter, *City View Park Complex Drops Attempt to Evict Woman: Effort Began After Rampage by Ex-Husband*, The Courier-Journal, Nov. 21, 1998 at 1A.

7/ Ethan Brennan Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 Law & Ineq. 471 (1997) (citing *West Bank Homes v. M.K.*, No. 1891221520, slip op. at 2 (4th Dist. Ct. Minn. Jan. 22, 1990) (order denying reconsideration)).

8/ Laura Griffin, *Eviction Upheld for Woman Who Was Attacked in Home*, Dallas Morning News, May 26, 1999 at 1A. This case was eventually settled. *See* Laura Griffin, *Crime Victim, Complex Settle Case*, Dallas Morning News, July 15, 1999 at 23A.

out and pointed it at her. She escaped and called the police. Later, she was ordered evicted from her apartment complex for violating her lease by allowing "criminal activity" on the premises. Her property manager said he could not ignore the violent incident that had occurred and started the eviction process in part to reassure other residents that something was being done about it. "She's not being evicted because she is a victim of domestic violence," said the landlord's attorney, "[i]f she is being evicted, it is for violating the lease."[9/]

- Margaret Ramirez was assaulted by a former boyfriend who pounded at her face while her six year old son tried to fend off her attacker with a stick. The Rio Lado housing authority moved to evict her because she allowed the assailant into her home. The housing authority attorney said "it's only fair to the residents that everybody be treated equally and that everybody understands: zero tolerance means zero tolerance."[10/]

- Gail Stacy's abuser was arrested three times for assaulting her and for attempting to break into her residence in the middle of the night. The Covington, Kentucky public housing authority sought to evict her because it claimed that domestic violence incidents

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9/ Camille Barbee, *Woman Faces Eviction Over Ex-Husband's Rampage; Advocates Decry Action Taken By City View Park*, Louisville Courier Journal, Oct. 22, 1998, at 1A. *See also* E.J. Hurst II, *Rules, Regs, and Removal: State Law, Foreseeability, and Fair Play in One Strike Terminations From Federally Subsidized Public Housing*, 38 Brandeis L.J. 733, 755-56 (2000).

10/ Diana Dworin, *Housing Agency Evicts More Than Lawbreakers*, Austin-American Statesman, Feb. 23, 1996, at A1.

> on the premises had threatened the health, safety or right to peaceful enjoyment of other public housing residents.[11/]

Landlords evict battered women for failing to prevent assaults because they believe that neighbors "cannot tolerate such behavior."[12/] They argue that battered women "endang[er] other residents by allowing [a] dangerous person on the premises."[13/]

Even when no property is damaged and no neighboring tenants complain, property managers claim that fellow residents suffer by being forced to witness a violent act.[14/] According to some landlords, battered women

> [do] not take steps to prevent a recurrence of violent acts, subjecting other tenants to witness the scene play out time and time again. [We] take such a hard stance on the issue of violence [in order] to maintain a peaceful living environment for all tenants.[15/]

Beliefs such as these are based on a misunderstanding of domestic violence, including the fundamental misunderstanding that battered women can control the behavior of their attacker. Eviction practices based on these misunderstandings further victimize innocent women and children. Indeed, "one strike" policies may have the exact opposite result from what well-meaning proponents intend, discouraging victims from reporting or escaping abuse by threatening them with eviction.

Notwithstanding several high-profile cases, it is extremely likely that domestic violence-related evictions are under-reported. Battered women may go to great lengths to hide their abuse from the police, their landlords, and their neighbors in order to guard against retaliation by their abuser, avoid societal prejudice, and minimize the risk of receiving an eviction notice. In addition, women may feel that they do not have cause to challenge strict liability evictions because these actions are portrayed as lawful. In that situation, fleeing to a safe shelter and caring for young children may take priority over fighting an unjust eviction.

The lack of highly publicized evictions of battered women is therefore not surprising. Advocates in the field report that these evictions -- and the threat of these evictions

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[11/] Def.'s Mem. Supp. Summ. J. at 4, *Housing Authority of Covington v. Gail Stacy*, (Ky. Dist. Ct. filed April 28, 1994) (94-C-00607).

[12/] Doug Grow, *When Victim is Seen as the Villian*, Minneapolis Star Trib., Dec. 29, 1989, at 1B. In *West Bank Homes*, the District Court rejected the landlord's view and refused to evict the tenant for "permitting" an assault on herself. Lauer, *supra*, at 471 (quoting *West Bank Homes*, at 3). *See also Moundsville Hous. Auth. v. Porter*, 370 S.E. 2d 341, 343 (W. Va. 1988) (per curiam) (overturning eviction order of battered woman whose landlord served eviction notice two days after tenant was beaten, hospitalized, and reported incident to police).

[13/] *Steven Scott Management*, 1999 WL 366596 at *1.

[14/] *United States v. C.B.M. Group, Inc.*, Civ No. 01-857-PA (D. Or., filed June 8, 2001).

[15/] Final Analysis and Investigative Report of Judith A. Keeler, Director, *Alvera v. Creekside Village Apartments*, Case No. 10-99-0538-8, at 24 (Seattle Fair Hous. HUB, April 13, 2001).

-- are a crisis for battered women.[16/] On their behalf, more than thirty *amici* have joined this brief.

III. PUNISHING THE VICTIMS OF VIOLENCE IS UNSOUND AND UNLAWFUL

Blaming victims is not an appropriate response to violence. Congress certainly has recognized this; there is no basis for interpreting federal law to authorize the eviction of victims. To the contrary, such a policy would be absurd in the extreme, plainly contravene the statute, and violate federal law.[17/] Victims of domestic violence are uniquely vulnerable to the threat of eviction. Strict liability eviction policies that aggravate the harsh effects of domestic violence are counterproductive, unsound, and unlawful.

A. Punishing The Victims Of Domestic Violence Is Plainly Wrong

Women are not engaging in criminal activity when they are beaten or abused in their home.[18/] Victims of domestic

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[16/] *See, e.g.*, Press Release, *Civil Rights Groups Fight Eviction of Battered Women Under "Zero Tolerance" Housing Policy* (July 10, 2001) ("zero tolerance" policies against battered women are common in many states). *See also* Appendix A to this brief, setting forth experience from across the country as to the urgency of this issue.

[17/] For these reasons, petitioners' interpretation is flatly inconsistent with Congress's unambiguous intent. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Even if the Court finds the statute is silent as to the existence of an "innocent tenant" defense to eviction, precluding such a defense is an unreasonable construction of the statute. *See id.* at 843, 844.

[18/] *Accord In re Sharwline Nicholson, et al.*, Prelim. Mem. and Inj., CV 00-2229, CV 00-5155, CV 00-6885, at 4 (E.D.N.Y. Oct. 25, 2001) (finding that battered mothers are not "'engaged in' domestic violence by being victims of such violence . . . .").

violence are not trying to threaten the health, safety or well-being of their neighbors. They are simply trying to rebuild their lives, and in doing so protect their safety and the safety of their children. Often the act of leaving or attempting to leave a violent relationship itself triggers the severest violence.[19/] For this reason, punishing victims of domestic violence with eviction -- or the threat of eviction -- exacerbates the underlying problem.

Although many people believe that battered women can easily leave an abusive home or relationship, this is not necessarily true.[20/] Violent relationships are characterized by substantial power disparities that make leaving very difficult for many women and children.[21/] Abusers undertake a wide range of strategies to isolate their victims emotionally and economically from their families and communities.[22/] They harass and intimidate victims, sabotage their efforts at

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[19/] Lauer, *supra*, at 479. ("A major reason why women may not leave abusive relationships is fear of increased violence during the attempted exodus and thereafter.") Batterers themselves decide when relationships become violent. Battered women cannot foresee that men they know will become batterers. Abusers do not necessarily behave abusively in relationships outside the home, and they give potential victims no warning of future violence inside the home. Even when a woman realizes that she is being abused, she may not know precisely when the abuse will happen.

[20/] *See Planned Parenthood*, 505 U.S. 833 at 892 (finding that "[m]any victims of domestic violence remain with their abusers because they perceive no superior alternatives"). *See also* Sara M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Victims Stay*, 28 Colo. Law. 19 (1999).

[21/] *See* Lauer, *supra*, at 477 (describing how "violent relationships are characterized by 'great power disparities'").

[22/] Many batterers use their victims' economic needs as leverage to force women and children to stay in abusive homes and relationships. *See* Claire M. Renzetti, *One Strike and You're Out*, Vol. 7 No. 6 Violence Against Women 685, 688 (2001).

employment and make harder battered womens' attempts to obtain independence.

Economic control is an important component of the batterer's system of maintaining authority over the victim.[23/] Abusers prefer their victims to be economically dependent because such dependence gives the abuser complete control in the relationship.[24/] It is not uncommon for abusers to control family finances and to sabotage victims' efforts to gain economic self-sufficiency. A woman who decides to leave her abuser faces great economic challenges regardless of her income level because she frequently has to leave behind her only financial resources or support. Women also face social pressure to maintain their relationships. They may believe that society, the legal system, and their communities consider dissolution of their relationships undesirable.[25/]

Leaving a violent home is even more difficult because of the severe lack of alternative housing. Crisis intervention services dedicated to assisting battered women typically

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[23/] Numerous women are forced to go back to their abusers because of lack of money or housing. U.S. Gen. Accounting Office *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 7-8 GAO/HEHS 99-12 (1998) (detailing evidence that desire for economic control underlies many brutal crimes against women).

[24/] Erin Meehan Richmond, *The Interface Of Poverty And Violence Against Women: How Federal And State Welfare Reform Can Best Respond*, 35 New Eng. L. Rev. 569, 573 (2001). *See also, Planned Parenthood*, 505 U.S. at 892 (noting that "[m]any abused women who find temporary refuge in shelters return to their husbands in large part because they have no other source of income.")

[25/] *See* Yvonne Aronson, *Zero Tolerance*, Health Matters, at *http://www.ashlandwi.com/memorial/placed/story/10-25-2000ad_three.html* (last visited Nov. 28, 2001).

provide temporary and emergency shelters for victims in immediate danger, but they do not offer refuge long term. With limited beds and restricted lengths of stay, they cannot meet the ongoing needs that victims have for permanent housing. Given the serious shortage of ready and affordable long-term housing, the more long-term prospects are equally grim.[26/]

It is no wonder that women who are brave enough to leave their abusive homes often end up homeless. Some experts estimate that more than half of homeless women are on the street because they are fleeing domestic violence.[27/] Domestic violence is among the most significant reasons given by homeless parents for their plight.[28/] It is no surprise that abusers hold tremendous power over their victims. Battered women know they have few alternatives.

[26/] *See, e.g.* Alison Frankel, *Domestic Disaster*, 6/1996 Am. Law. 55 (1996); Robin Hammael-Urban & Jill Davies, *Federal Housing and Domestic Violence: Introduction to Programs, Policy, and Advocacy Opportunities* (National Resource Center on Domestic Violence), Oct. 1999, at 8-9. *See also Mitchell v. U.S. Dep't of Hous. and Urban Dev.*, 569 F. Supp. 701 (N.D. Cal. 1983) (the scarcity of public housing constitutes irreparable harm sufficient to enjoin eviction).

[27/] "[A]s many as 50 percent of homeless women and children are fleeing domestic violence." *Morrison*, 529 U.S. at 631. *See also Washington Legal Clinic for the Homeless, Inc. v. Barry*, 918 F. Supp. 440, 444 (D.D.C. 1996) (finding that "many families" seeking emergency housing services are "fleeing domestic violence"); *Women and Violence, Hearings before the U.S. Senate Judiciary Committee*, Sen. Hearing No. 101-939, pt. 2, at 79 (1990). In a survey of women's homelessness in Massachusetts, more than half of the women surveyed said that domestic violence was a cause of their homelessness. *Lifting the Voices of Homeless Women*, (Roofless Women's Action Research Mobilization) April 1997 at 5.

[28/] Ralph Nunez & Cybelle Fox, *A Snapshot of Family Homelessness Across America*, Pol. Sci. Q. Vol. 114, No. 2, at 3 (Summer 1999).

"Lack of affordable housing and long waiting lists for assisted housing mean that many women and their children are forced to choose between abuse at home or the streets."[29/]

Strict liability policies plainly give batterers control over a family's housing. They reflect an "insidious . . . assumption that the abuser is a person under the woman's control when [research] shows the opposite to be the case."[30/] Batterers can and do take advantage of strict liability policies to further control and punish their partners by deliberately engaging in or threatening to engage in wrongful behavior.[31/] These policies empower abusers by making it possible for batterers to threaten a family with homelessness. At the same time, they discourage battered women from taking steps to protect themselves, such as calling the police, requesting emergency medical care, obtaining a protective order, or confiding in neighbors. For these reasons, Congress did not authorize strict liability evictions against victims of crime.

B. Congress Did Not Authorize Policies That Punish Victims Of Domestic Violence

Congress has not authorized "zero tolerance" against the victims of crime. "One strike" policies cannot in fact be implemented consistent with federal law. Congress has enacted a wide range of programs and encouraged states to adopt policies to protect and serve the victims of domestic violence. This framework provides direct and forceful

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29/ *Domestic Violence and Homelessness* Fact Sheet (Nat'l Coalition for the Homeless) April 1999.

30/ *See* Renzetti, *supra,* at 690.

31/ *Id.*

evidence that battered women should not be punished for their injuries. For this reason, there is no need for statutory language expressly excusing victims of crime from strict liability evictions; such is the clear intent of Congress.

1. Strict Liability Evictions Of Battered Women Are Not Authorized Under Federal Law

The U.S. Housing Act, 42 U.S.C. § 1437 *et seq.*, as amended by the Anti-Drug Abuse Act of 1988,[32/] the Cranston-Gonzales National Affordable Housing Act of 1990,[33/] and the Housing Opportunity Program Extension Act of 1996,[34/] does not authorize the eviction of victimized household tenants. The law targets criminal activity that threatens "the health, safety [and] right to peaceful enjoyment of the premises by *other tenants*."[35/] Blameless and injured tenants are precisely whom the law protects. Because victims of criminal activity are among the "other tenants" in the protected class, authorizing their eviction under the law would be entirely illogical and contrary to the stated objective of the law. In enacting section 1437d(l)(6) to protect public housing residents from crime, Congress could not, at the same time, intend to evict residents who are victims of crime.[36/] At most, the statute authorizes the

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32/ Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 42 U.S.C. § 1437d (l)).

33/ Pub. L. No. 101-625, Sec. 505, 104 Stat. 4079, 4185 (1990) (codified as amended at 42 U.S.C. § 1437d)).

34/ Pub. L. No. 104-120, § 9(a)(R), 110 Stat. 836 (1996) (codified as amended at 42 U.S.C. 1437(d)(1)).

35/ *See* 42 U.S.C. § 1437d(l)(6) (1994 & Supp. IV 1998) (emphasis added).

36/ Pub. L. No. 100-690, 102 Stat. 4181 (1988). Such a result would be "absurd" in the extreme. Long-standing precedent precludes statutory

eviction of persons consenting to or controlling the criminal activity.[37/] Authorizing the eviction of battered women because they have been attacked is therefore patently "unreasonable"[38/] and, moreover, inconsistent with federal public housing law.

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interpretation leading to absurd results. *See Public Citizen v. United States*, 491 U.S. 440, 454-58 (1989) (refusing to follow a statutory construction that "is difficult to fathom or . . . seems inconsistent with Congress's intention."); *accord Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1882) (declining to follow the plain language of a statute in "consideration of . . . the absurd results [that would] follow.") No reasonable interpretation of section 1437d(1)(2)'s language permits the eviction of innocent victims of domestic violence. Petitioners' argument that the statute authorizes local housing authorities to exercise their discretion in this regard is patently unreasonable given the lack of standards for exercising that authority and the clear Congressional policy against domestic violence and in support of victims. *See infra*.

37/ By authorizing the termination of a tenancy when "criminal activity" is engaged in by persons over which control may be exercised, Congress intended to provide incentives to prevent criminal activity. In the absence of the ability to exercise actual control, the statute creates no incentive and does nothing to target violence. *Cf.* 56 Fed. Reg. 51,560, 51,563 (Oct. 11, 1991) (implementing rules to provide the "strongest incentive to assure that family members do not consent" to criminal activity); *id.* at 51,566 (rules intended to "convince [families] to oust a person" who engaged in criminal activity); *id.* at 51,567 (rules intended to create incentives to tenants to exercise control over criminal activity by guests, household members, and others they control).

38/ *See* 42 U.S.C. § 1437d(l)(2) (prohibiting "unreasonable terms and conditions" on leases). The legislative history provides additional support for this view. The committee report that accompanied the 1990 Cranston-Gonzalez Affording Housing Act recognized that eviction is not appropriate in every instance. The report stated that,

> [T]he committee anticipates that each case will be judged on its individual merits and will require the wise exercise of human judgment by the [Public Housing Authority] and the eviction

In fact, when President Bill Clinton launched the current "One Strike" policy in 1996, he emphasized that it was intended to punish the perpetrators of criminal activity, not their victims. In his 1996 State of the Union address, President Clinton "challenged local housing authorities and tenant associations to adopt [the One Strike policy] to simply say '*If you mess up* your community, you have to turn in your key. *If you* insist on *abusing or intimidating or hurting* other people, you'll have to live somewhere else.'"[39/] The intent was to punish those who commit violent acts and protect those against whom such acts are committed.

Announcing HUD's rule implementing the One Strike policy, the HUD Community Safety and Conservation Division stated that only "people in public housing who

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> court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent them.

S. Rep. No. 101-316 at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. This language makes clear that Congress authorized eviction only when the tenant was personally at fault or if the tenant had not taken reasonable steps to prevent the activity that is grounds for the eviction.

39/ Clinton, William J., remarks announcing the *One Strike and You're Out* Initiative in Public Housing, 32 Weekly Comp. Pres. Doc. 582 (Mar. 28, 1996) (emphasis added). President Clinton went on to indicate that:

> [I]t's morally wrong for *criminals* to use up homes that could make a big difference in the lives of decent families . . . . [I]f people aren't going to do anything wrong in public housing, they have nothing to fear from 'One Strike and You're Out.'

Id at 583. The President's rhetoric makes clear that the persons against whom the policy should be addressed are the perpetrators of violence and not their victims.

engage in . . . criminal activity will face certain eviction."[40/] As these statements show, the One Strike policy legitimately targeted those who engage in criminal activity; it did not target victims.

It is clear that targeting victims of crime through such evictions would be patently unreasonable. No behavior would be addressed that Congress has condemned, and no incentive would be created to deter violence, which is the targeted behavior. In fact, a statutory interpretation that authorizes victims to be threatened or evicted would only increase the power of abusers and the harm they may cause.[41/]

2. Strict Liability Evictions Violate Federal Housing Law

Strict liability evictions of victims of domestic violence may also constitute gender discrimination and for that reason should not be authorized under section 1437d(l)(2). Statistics show that women are five to eight times more likely to experience violence by an intimate partner than men.[42/] In 85 percent of domestic violence incidents, crimes are committed by men against women;[43/] 72 percent of

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[40/] U.S. Dept. of Hous. And Urban Dev., Community Safety and Conservation Div., *One Strike and You're Out, at* http://www.hud.gov/pih/programs/ph/de/programs/onestr.html (emphasis added).

[41/] Such an interpretation would disserve the express Congressional interest and is therefore unreasonable. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991).

[42/] *See, e.g.*, Tjaden & Thoennes, *supra*, at 6-8 (citing study where 25 percent of surveyed women, but only eight percent of men, said they were raped and/or physically assaulted by a current or former spouse).

[43/] Rennison & Welchans, *supra*, at 1-2.

intimate homicide victims are female.[44/] Strict liability eviction policies applied to victims of domestic violence therefore disproportionately affect women. As such, they likely discriminate against women and violate section 804 of the Fair Housing Act, 42 U.S.C. § 3604.[45/] Specifically, evicting all members of a household because of an incident of domestic violence -- regardless of whether the household

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[44/] In 1998, three out of four domestic violence homicide victims were women. *Id.* at 1.

[45/] Pub. L. 90-284, Sec. 804, 82 Stat. 83 (1968). The United States made precisely this claim in a case that it settled against an Oregon landlord on October 18, 2001. *See United States and Tiffanie Alvera v. C.B.M. Group, Inc.*, CV No. 01-857-PA (D. Or. filed June 8, 2001), Consent Decree (signed Nov. 5, 2001). In *Alvera*, a battered woman obtained a restraining order against her husband, furnished a copy to her landlord to ensure that the order was effected, and subsequently received a notice of eviction on the grounds that someone "under the tenant's control" committed an act of violence on the premises. *Id.* at ¶3. As part of the settlement, the landlord agreed not to take "any action directed to the eviction of any person on the basis that such person has been the victim of violence, including domestic violence, initiated by another person, whether or not such person is residing in the tenant's household". *Id.* at ¶8(a). The United States also required the landlord to review and revise its policies to comply with this standard, post a notice to all tenants informing them of the new policy, and arrange training for all employees concerning "their responsibilities under federal, states and local Fair Housing laws, regulations and ordinances." *Id.* at ¶¶12-13, 16. Before filing the complaint, the United States, through HUD, charged the landlord with unlawfully discriminating against Ms. Alvera. Determination of Reasonable Cause, *Alvera v. Creekside Village Apartments*, Case No. 10-99-0538-8, at 6 (Seattle Fair Hous. HUB April 16, 2001); *U.S. Dep't of Hous. and Urban Dev. v. C.B.M. Group, Inc.*, U.S. Dep't of Hous. and Urban Dev., Office of Administrative Law Judges, Docket No. HUDLJ 10-99-0538-8, at 2,7 (April 16, 2001) (charge of discrimination).

member is a victim or a perpetrator of the crime -- has an adverse effect based on gender in violation of law.[46/]

3. Strict Liability Evictions Are Contrary To Public Policy

Finally, in determining whether Congress specifically intended to authorize strict liability evictions of battered women and their children under section 1437d(l)(2), the Court "should not confine itself to examining a particular statutory provision in isolation."[47/] Instead individual statutory provisions must be considered in "context."[48/] As this Court reiterated last year,

> It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'[49/]

[46/] Moreover, as the Ninth Circuit aptly stated, "[p]enalizing conduct that involves *no intentional wrongdoing* by an individual can run afoul of the Due Process Clause." *Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir. 2001) (citing *Scales v. United States*, 367 U.S. 203, 224-225 (1961) (emphasis in original). For this Court to adopt a statutory construction that increases "the Constitutional difficulties" of a statute "would directly contradict one of the most basic canons of statutory interpretation." *United States v. Morrison*, 529 U.S. 598, 631 n. 2 (2000) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

[47/] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

[48/] *Id.*

[49/] *Id.* at 133 (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

The meaning of this particular statute can be affected by "other Acts, particularly where Congress has spoken *subsequently and more specifically* to the topic at hand."[50/]

Most importantly here,[51/] Congress has directly sought to remedy the problem of domestic violence and homelessness through legislation on various occasions since 1988. Congress repeatedly acted to provide services and support for victims of domestic violence. For example, in 1984 Congress enacted the Family Violence Prevention Services Act[52/] and the Victims of Crime Act[53/] to provide funds "for the purpose of providing immediate shelter and related assistance to victims of family violence."[54/]

Similarly, Congress passed the Violence Against Women Act in 1994[55/] ("VAWA") to allocate funds to combat violent crimes[56/] and to reduce sexual assaults against women.[57/] This law includes funds earmarked to encourage arrest

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[50/] *Id.* at 133 (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-531 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988)) (emphasis supplied).

[51/] *Accord Brown & Williamson Tobacco*, 529 U.S. at 133.

[52/] Pub. L. No. 98-457, 98 Stat., 1757 (1984) (codified as amended at 42 U.S.C. §§ 10401 *et seq.* (1994 and Supp. V 1999)).

[53/] Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified as amended at 42 U.S.C. §§ 10601 *et seq.* (1994 and Supp. V 1999)).

[54/] *See id.* at § 10402(f).

[55/] Violence Against Women Act, Pub. L. No. 103-322, Sec. 40001, 108 Stat. 1902-55 (1994) (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C. and 42 U.S.C.).

[56/] 42 U.S.C. §§ 10401 *et seq.*

[57/] *See id.* § 13941.

policies,[58/] to fund shelters for battered women,[59/] to maintain databases about domestic violence,[60/] and to fund a national domestic violence hotline to facilitate access to information and assistance for battered women.[61/] In 2000, Congress reauthorized VAWA ("VAWA II"),[62/] with $3.3 billion to address violence against women over the next five years. VAWA II includes coverage for dating violence and new programs for transitional housing, supervised visitation centers, civil legal assistance and judicial education, as well as provisions to give additional protection to battered immigrant women. If anything, these statutes show that Congress has sought to help domestic violence victims.

Most compelling of all, Congress called on each Public Housing Authority to consider preferences for domestic violence victims on public housing waiting lists.[63/] It would be a tortured reading of the statute to authorize eviction in light of this express Congressional directive.

[58/] *See id.* § 14031.

[59/] *See id.* § 10402(a)(1). Counseling and shelter programs furnish a variety of services, including hotlines, individual and group counseling, housing, advocacy services, physical protection, emergency medical care, food, clothing, transportation, childcare, and outreach and education programs. Still, resources are scarce, and the demand for shelters far exceeds their capacity.

[60/] 42 U.S.C. § 13962 (1999).

[61/] *See id.* at § 10416.

[62/] Pub. L. No. 106-386 Sec. 1001 *et seq.*, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.).

[63/] *See* Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, Sec. 514(e), 112 Stat. 2518 (1999).

Congress's recurring efforts to aid victims of domestic violence, and provide them housing, arises from its recognition that battered women frequently are victimized as residents of public housing. Using Section 1437d(1)(6) to punish battered women wholly contradicts Congress's stated preference for helping victims of domestic assault, and "plainly contradict[s] Congressional policy."[64/]

V. CONCLUSION

Battered women not only face abuse in the home, they fear the loss of their homes as a result of strict liability eviction policies applied against them. Congress could not, and did not, intend Section 1437d(l)(6) to authorize such actions. Innocent victims of crime should not fear homelessness. For these reasons, the Court of Appeals for the Ninth Circuit correctly interpreted the Congressional directive and its decision should be AFFIRMED.

[64/] *Brown & Williamson Tobacco*, 529 U.S. at 136.

Respectfully submitted,

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APPENDIX

INTEREST OF AMICI CURIAE

The following organizations submit this brief as *Amici curiae* in support of Respondents:

The *National Network to End Domestic Violence* ("NNEDV") is a not-for-profit organization incorporated in the District of Columbia since 1995. NNEDV is a network of state domestic violence coalitions, representing over 2,000 member programs nationally. NNEDV serves as the national voice of battered women and their children and those who provide direct services to them. From testifying before Congress on the housing needs of battered women to serving on the National Legislation Task Force on Housing and Domestic Violence, NNEDV is a national leader in efforts to create safe homes for battered women and their children.

The *National Network to End Domestic Violence Fund* ("NNEDV Fund") is a not-for-profit organization incorporated in the District of Columbia since 1996 for the purposes of providing technical assistance, training and public education to advocates, professionals and individuals who encounter battered women in their work and communities. The NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local welfare, justice system personnel, and others working to end domestic violence. The NNEDV Fund works collaboratively with national homelessness and housing organizations to strengthen the federal response to the housing needs of battered women and their children.

The *California Alliance Against Domestic Violence* ("CAADV") is a non-profit organization incorporated in the state of California. Initiated in the late 1970's, CAADV has

functioned as the statewide voice and organizing force on behalf of the needs and interests of battered women and domestic violence programs throughout the state. Affordable housing is extremely important to battered women and their children. Because batterers often use economic control to maintain power over their partners, women fleeing violent homes frequently lack the necessary resources to establish their independence apart from the batterer. This is why safe and affordable housing is of extreme importance in the struggle to deter domestic violence. It is our experience that "One Strike" policies are frequently applied to the detriment of victims of domestic violence. For that reason, we support Respondents in urging this Court to affirm the Ninth Circuit en banc ruling.

The *Alabama Coalition Against Domestic Violence* ("ACADV") was organized in 1978 as a network of shelters for battered women and their children and of organizations and individuals concerned about domestic violence in Alabama and the nation. Affordable housing is vitally important to battered women and their children. Women fleeing violent homes often do not have the resources to establish themselves separately from their abusers and must turn to subsidized or public housing in order to meet their independent housing needs. It has been our experience that strict liability policies are frequently applied to victims of domestic violence. Certainly, we have seen many situations in which battered women have been denied or evicted from public housing because of actions taken by their abusers without the consent or involvement of the victim.

The *Alaska Network on Domestic Violence & Sexual Assault* ("ANDVSA") is a non-profit organization incorporated in the State of Alaska. Founded in 1978, ANDVSA seeks to provide a collective voice for battered women in Alaska and for the local programs that serve them

and to improve and expand the services available to battered women and their children in Alaska. In particular, affordable housing is vitally important to battered women and their children. Women fleeing violent homes often don't have the resources to establish themselves separately from the abuser. This is why safe and affordable housing is a crucial element in the struggle to end family violence. Although the above referenced case references drug-related criminal activity, it has been our experience that such laws also can be applied similarly to the detriment of victims of domestic violence.

The *Arizona Coalition Against Domestic Violence* ("ACADV") is a non-profit organization, incorporated in the State of Arizona. Founded in 1980, ACADV is a statewide membership organization of battered women, formerly battered women, domestic abuse programs, and individuals committed to ending domestic violence. Affordable housing is vitally important to battered women and their children. ACADV believes that victims of domestic violence should not be punished by strict liability policies that force their eviction from their homes.

The *Colorado Coalition Against Domestic Violence* ("CCADV") was organized in 1978 as a network of shelters for battered women and their children. Affordable housing has been a primary concern for CCADV. Housing is vitally important to battered women and their children as oftentimes women who escape from violent homes do not have the economic resources to obtain housing. CCADV is committed to assisting victims and their children in every way necessary for their well being and safety.

The *Connecticut Coalition Against Domestic Violence* ("ConnCADV") is a non-profit organization, incorporated in the State of Connecticut. Founded in 1978, ConnCADV is comprised of organizations and individuals with concerns

regarding domestic violence issues. ConnCADV seeks to improve and expand the services available to battered women and their children in Connecticut by providing technical assistance to local programs to promote best practices and to provide community education and public awareness on issues of domestic violence. One issue that demands particular attention is affordable, safe housing. Economic control is a tool used by batterers to maintain power and control over their victims. Therefore, women fleeing violent homes often don't have the resources to establish themselves separately from their abuser. ConnCADV is working hard with our local programs to promote housing and to eliminate barriers to housing.

The *Delaware Coalition Against Domestic Violence* ("DCADV") is a statewide, nonprofit organization established in 1994. Our current membership includes private, nonprofit agencies and programs providing shelter and direct services to adult victims of domestic violence, allied organizations and supportive individuals from throughout our state. In all of our planning efforts, the need for safe affordable housing is consistently identified as one of the fundamental needs of battered women and their children. Along with transportation and childcare, safe and affordable housing is critical if abused women are to live free from violence. Public housing has always represented an important piece of the safety net for victims who must escape an abusive relationship, and DCADV's member programs have long worked with housing systems in Delaware to help facilitate access to public housing for battered women. Perpetrators often use access to economic resources including housing as a means to maintain control in their relationships. Although the above referenced case relates directly to drug-related criminal activity, such laws are frequently applied to victims of domestic violence.

The *District of Columbia Coalition Against Domestic Violence* ("DCCADV") is dedicated to the elimination of domestic violence in the District of Columbia. Access to safe and affordable housing is often critical for women fleeing abuse and working to establish themselves independently. When a woman leaves an abusive relationship she must find an affordable place to live that is out of harm's way. The ability to do this often determines whether she can truly begin a new life. The DCCADV has provided technical assistance and training to housing providers on domestic violence and has worked closely with housing advocates and organizations to improve access to victims. The critical need for safe and affordable housing for battered women and their children can not be overstated.

The *Hawaii State Coalition Against Domestic Violence* ("HSCADV") is a private, not-for-profit organization. As a statewide coalition of domestic violence programs, our mission is to ensure the safety and protection of women in intimate relationships by coordinating domestic violence prevention and intervention services, affecting public policy, and establishing coordinated and consistent procedures and actions by the civil and criminal justice systems in Hawaii. The HSCADV believes affordable housing is vitally important to battered women and their children. Because economic control is a tool used by batterers to maintain power and control over their victims, women fleeing violent homes often don't have the resources to establish themselves separately from their abuser. This is why safe and affordable housing is a crucial element in the struggle to end family violence.

The *Idaho Coalition Against Sexual and Domestic Violence* ("ICASDV") is a non-profit organization incorporated in the State of Idaho. Founded in 1982, ICSDV's members include sexually abused/battered women,

former victims, domestic violence and sexual assault programs, and individuals committed to ending violence. From its earliest stages, ICASDV was comprised of organization and individuals with concerns regarding victims' issues. ICSDV seeks, among other things, to provide a collective voice for victims of abuse in Idaho and for the local programs that serve them, so as to expand the services available to victims and their children. Women fleeing violent homes often don't have the resources to establish themselves separately from their abuser. This is why safe and affordable housing is a crucial element in the struggle to end family violence.

The *Illinois Coalition Against Domestic Violence* ("ICADV") was created in 1978 for the purpose of advocating change in public policy and increasing public awareness and funding of local programs in an effort to end domestic violence against women and their children. The ICADV recognizes that safe, affordable housing must be available to victims of domestic violence who are forced to flee their homes. Victims often rely upon low income housing funded by HUD when it is available. Perpetrators of domestic violence may stalk their victims, follow them to their new homes, break in and assault them. A victim should not be evicted when this happens, because she has no control over the perpetrator's behavior. The law should forbid eviction of the victim and require that all appropriate criminal charges be filed against the perpetrator. In the absence of clear guidelines, the local housing authority staff makes the decision to evict or not, solely upon their own local policy and judgment. As a result, there is no consistency in eviction decisions, and many battered women are victimized by losing their homes.

The *Kansas Coalition Against Sexual and Domestic Violence* ("KCSDV") is a non-profit, Kansas corporation,

providing a statewide voice in Kansas for battered women, as well as the domestic violence programs that serve them. Housing is one of many issues that KCSDV routinely addresses with its members. Housing laws, whether in Kansas or in other state or federal jurisdictions, must be interpreted in light of the unique circumstances effecting victims of domestic violence. KCSDV recognizes that *HUD v. Rucker* involves drug-related criminal activity in a public house project; however, KCSDV is concerned that the resulting case law could be applied to any violence-related activity, including domestic violence, and may result in victims of domestic violence being evicted from their homes due to their partners' violent behavior. Victims and survivors of domestic violence have no control over the violent behavior of their partners and should not be penalized or further victimized by being evicted because of it.

The *Kentucky Domestic Violence Association* ("KDVA") is a nonprofit organization that provides training, technical assistance and support services to Kentucky's seventeen domestic violence programs. From its earliest stages, KDVA has recognized that fact that affordable and safe housing is vitally important for battered women and their children. Too often our society's response to domestic violence is to question "why doesn't she just leave?". Those of us who do this work on a daily basis know that the real question is "where can she go?" This is why safe and affordable housing is a crucial element in the struggle to enable victims to be able to leave a battering relationship.

The *Michigan Coalition Against Domestic and Sexual Violence* ("MCADSV") is a statewide coalition of over 70 domestic violence and sexual assault programs in Michigan. These programs provide comprehensive domestic violence and sexual assault services to victims of domestic violence and sexual assault in Michigan. Affordable housing, often

provided exclusively through public housing in Michigan, is essential for many battered women who are trying to escape a violent partner. Studies on separation violence underscore the reality that perpetrators of domestic violence do not stop their abuse, but rather often escalate the use of violence, after the victim leaves the relationship. It is not uncommon for perpetrators to stalk, assault or perpetrate other crimes in retaliation for leaving, involving the legal system and/or to frighten the victim into returning to the relationship. Perpetrators further attempt to sabotage the victim's efforts to escape by a variety of tactics, including using their own involvement in crime as a threat to the victim. Interpretation of HUD policy to authorize the eviction of victims of crime, regardless of whether the victim had knowledge of the crime or could be considered to have control over the criminal action, would unfairly and dangerously penalized victims of domestic violence and their children. Such an interpretation would be antithetical to the numerous federal and state public policy initiatives directed at protecting victims of domestic violence and holding perpetrators accountable for their abuse.

The *Minnesota Coalition for Battered Women* ("MCBW") is a non-profit organization incorporated in the State of Minnesota. Founded in 1978, MCBW is a statewide membership organization of battered women, formerly battered women, domestic abuse programs, and individuals committed to ending domestic violence. In particular, affordable housing is vitally important to battered women and their children. Economic control is a tool used by domestic batterers to maintain power and control over their victims. Therefore, women fleeing violent homes often don't have the resources to establish themselves separately from their abuser. Safe and affordable housing is a crucial element in the struggle to end family violence. MCBW routinely advocates for housing laws that take into

consideration the unique concerns of battered women and their children before the Minnesota Legislature.

The *National Training Center on Domestic and Sexual Violence* ("NTCDSV") is a non-profit organization incorporated in the State of Texas. Founded in 1998, the mission of NTCDSV is to design, customize and provide training and consultation; influence policy; promote collaboration; and enhance diversity with the goal of ending domestic and sexual violence. Safe, affordable housing is crucial to this network of safety. Although the above referenced case is about drug-related crimes, it is our experience that such rules are applied to victims of domestic violence as well.

The *Nebraska Domestic Violence Sexual Assault Coalition* ("NDVSAC") is a statewide membership network of domestic violence and sexual assault programs, individuals, and organizations working to end violence against women and children. NDVSAC's purpose is to ensure that adequate emergency services are available to the increasing number of women and children needing safe shelter, support, and assistance. NDVSAC realizes the importance of affordable housing for the victims of domestic violence. We are working to ensure laws are properly drafted to allow just that. NDVSAC also serves as a statewide resource and training center and works to increase public awareness and understanding about these crimes.

The *New Hampshire Coalition Against Domestic and Sexual Violence* ("NHCADSV") is a not-for-profit organization incorporated in the State of New Hampshire for the purpose of coordinating services and advocacy on behalf of the victims of domestic violence and their minor children. In particular, affordable housing is vitally important to battered women and their children. Economic control is a

tool used by domestic batterers to maintain power and control over their victims. This is why safe and affordable housing is a crucial element in the struggle to end family violence. NHCADSV routinely advocates for housing laws that take into consideration the unique concerns of battered women and their children before the New Hampshire legislature.

The *New Jersey Coalition for Battered Women* ("NJCBW") is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. The NJCBW seeks, among other things, to provide a collective voice for battered women in New Jersey by providing technical assistance to promote the sharing of information between shelter providers in New Jersey and to provide for public and community education on issues of domestic violence. It is particularly difficult for battered women in New Jersey to secure affordable housing. New Jersey is the third most expensive state in the nation in which to lease an apartment. This is why the availability of safe and affordable housing is a crucial element in the struggle to end domestic violence. The NJCBW has been working with other non-profit organizations to pass laws to help create more affordable housing.

The *New Mexico Coalition Against Domestic Violence* ("NMCADV") was organized in 1982. NMCADV has been at the forefront working to achieve a coordinated local, regional, and statewide response to domestic violence. NMCADV members, affiliates, and advocates are committed to ending the violence between adult couples, in teen relationships, and in same sex relationships. The vision of the NMCADV is that children will grow up without witnessing and experiencing violence in their homes.

The *New York State Coalition Against Domestic Violence* ("NYSCADV") is the only statewide, non-profit organization in New York State whose primary goal is the elimination of domestic violence. Since its inception in 1978, the Coalition has been a driving force behind support for the development of hundreds of programs throughout New York State that provide services to abused women and their children. Safe affordable housing is vitally important to abused women and their children. Abusers employ economic control, including access to housing, to establish and maintain power over their victims. Women often want to flee violent homes but don't have the means to establish themselves separately from their abusers without assistance. Public housing can provide this assistance. However, if a woman is not able to leave her abuser or has chosen not to leave for a variety of reasons, she should still be afforded safe and affordable housing and not punished for her abuser's actions. The NYSCADV advocates for housing laws that take in consideration the concerns of women who are abused and their children and holds batterers accountable for their actions, not their victims.

The *North Carolina Coalition Against Domestic Violence* ("NCCADV") was organized in 1981 as a network of shelters for battered women and their children. NCCADV seeks, among other things, to provide a collective voice for battered women in North Carolina and for the shelters that serve them. In particular, affordable housing is vitally important to battered women and their children. Economic control is a tool used by batterers to keep their victims in check. Therefore, women fleeing violent homes often don't have the resources to establish themselves. This is why safe and affordable housing is a crucial element in the struggle to end family violence.

The *Ohio Domestic Violence Network* ("ODVN") is a private, non-profit organization incorporated in the State of Ohio. Founded in 1989, ODVN is the collective voice of over one hundred domestic violence and allied programs and numerous individuals in Ohio. Affordable housing is one of the vitally important issues for battered women and their children. Economic control is a tool used by batterers to obtain and maintain control of their victims. Women fleeing violence need safe and affordable housing. Although the above referenced case references drug-related criminal activity, it has been our experience that such laws are also applied to domestic violence activities. ODVN advocates for housing laws that take into consideration the unique concerns of battered women and their children.

The *Oklahoma Coalition Against Domestic Violence and Sexual Assault* ("OCADVSA") was organized in 1981 as a network of shelters and crisis centers for victims of sexual assault, battered women and their children. OCADVSA seeks, among other things, to provide a collective voice for battered women in Oklahoma and for the programs that serve them. In particular, affordable housing is vitally important to battered women and their children in Oklahoma. Battered women in Oklahoma list housing as one of the top three barriers to extricating themselves from their abusive partner.

The *Pennsylvania Coalition Against Domestic Violence* ("PCADV") is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of the victims of domestic violence and their minor children. Battered women must be afforded the remedy of safe and affordable housing for themselves and their children. Public housing provides an opportunity to achieve safety and autonomy from battering for numerous battered women and their children.

The *Rhode Island Coalition Against Domestic Violence* ("RICADV") is a nonprofit organization, incorporated in the State of Rhode Island and Providence Plantations. The RICADV advocates for the housing concerns of domestic violence victims in Rhode Island. Part of this work involves advocating for housing policies that take into consideration the safety concerns and economic reality for domestic violence victims. The current HUD policy of evicting household members from public housing on the basis that one member has participated in "criminal related drug activity" is blind to the fact that domestic violence victims are often not able to prevent such activity when it is carried out by an abusive partner. This policy and other policies of zero tolerance for criminal activity have been used as a basis to evict domestic violence victims from public housing when there has been an incident of domestic violence. Housing policies that create more danger for domestic violence victims by leaving them homeless and penalizing them for their abusive partner's behaviors will create grave danger for battered women and their children.

Sojourn Services for Battered Women and Their Children ("Sojourn") is a non-profit agency established in Santa Monica, California in 1977. Sojourn provides free services to victims of domestic violence. Our programs include a 24-hour crisis hotline, a community education and outreach program, an emergency response team, support groups and the Children's Program. Access to safe and affordable housing is the single issue having the greatest impact on their future. Many women feel trapped in a violent home because they fear becoming homeless if they were to leave. Unfortunately, that fear is all too justified. A high percentage of homeless women and children ended up on the streets while attempting to flee violent homes. Public housing is critical to helping women and children escape, but strict liability policies such as "One Strike" threaten victims

of domestic violence with the loss of their homes due to circumstances beyond their control.

The *South Carolina Coalition Against Domestic Violence and Sexual Assault* ("SCCADVASA") is a strong voice for women's rights in South Carolina. SCCADVASA is a private, non-profit organization founded in 1981 to represent the needs of victims/survivors of domestic and sexual violence and to advocate for the providers of service to individuals who have suffered as a result of these crimes. In particular, affordable housing is vitally important to battered women and their children. Although the above referenced case refers to drug-related criminal activity, it has been our experience that such laws are also applied similarly to victims of domestic violence. SCCADVASA has a long history of providing technical assistance to local programs in South Carolina on housing issues. SCCADVASAS also routinely advocates for housing laws that take into consideration the unique concerns of battered women and their children with the South Carolina Legislature.

The *Vermont Network Against Domestic Violence and Sexual Assault* is a statewide coalition of sixteen domestic violence and sexual assault programs in Vermont. These programs provide comprehensive domestic violence and sexual assault services to each county in Vermont. Affordable housing is vitally important to battered women and their children. In Vermont, as in many states, available affordable housing is scarce. Many battered women must depend on public housing to meet their housing needs. The above referenced case references drug-related criminal activity, but it has been our experience that such laws may also be used against victims of domestic violence. Consequently, this case is of extreme interest to us. We join in the amicus brief submitted by various domestic violence

organizations and advocates and urge your support for the Respondents in this matter.

The *Washington State Coalition Against Domestic Violence* ("WSCADV") is a non-profit organization, incorporated in the state of Washington. Founded in 1990, WSCADV is a statewide membership organization comprised of organizations and individuals committed to eradicating domestic violence. In relation to housing, it is vital that battered women have affordable housing available to them when, and if, they choose to flee their violent home. Domestic batterers develop numerous ways to maintain power and control over their victim. When battered women seek housing, their choices are often extremely limited if the abuser controls the finances of the couple, since the battered women would then have very little, if any, access to economic resources. In addition to this economic hurdle, batterer's generally do not stop seeking power and control when their partner leaves. Often, the act of leaving the abuser strengthens the abuser's resolve to regain that connection with their partner. Holding a tenant, who has been a victim of domestic violence, responsible for the behavior or criminal activity of their current or former partner, with regards to the tenant's lease, unfairly penalizes the victim and puts the power and control squarely back into the hands of the perpetrator. Such a reading of the statute undermines the effectiveness of affordable, independent housing for battered women and their children. Furthermore, allowing federal housing regulations to permit victims of crime to be punished for the actions of the perpetrator of crimes against them contradicts the intent of Congress in its enactment of the Violence Against Women Act and other remedial statutes intended to assist crime victims.

The *West Virginia Coalition Against Domestic Violence* ("WVCADV") is a network of thirteen licensed domestic

violence programs and their forty outreach offices as well as a central office that provide services to the fifty-five counties of the state. An on-going concern of WVCADV is the impact of domestic violence on the ability of survivors of intimate personal abuse to find adequate and safe housing for themselves and for their children. Emergency and transitional housing are by their nature only a step toward a more permanent home. Perpetrators of abuse, however, often use this most basic human need for shelter as a tactic for maintaining power and control over their victims. Although the above referenced case relates to drug-related criminal activity, it has been our experience that such laws can be applied similarly to violence-related activity including domestic violence. WVCADV joins in this brief and advocates and urges your support for the respondents in this matter.

The *Wisconsin Coalition Against Domestic Violence* ("WCADV") is a non-profit organization incorporated in the State of Wisconsin. Founded in 1978, WCADV is a statewide membership organization of battered women, formerly battered women, domestic abuse programs, and individuals committed to ending domestic violence. In particular, affordable housing is vitally important to battered women and their children. Economic control is a tool used by domestic batterers to maintain power and control over their victims. Therefore, women fleeing violent homes often don't have the resources to establish themselves separately from their abuser. Although the above referenced case references drug-related criminal activity, it has been our experience that such laws are applied similarly to victims of domestic violence.

The *Wyoming Coalition Against Domestic Violence and Sexual Assault* ("WCADVSA") was organized in 1980 and incorporated as a private non-profit in 1984. WCADVSA

provides a state and national level voice for battered women and sexual assault victims and the network of domestic violence and sexual assault (DV/SA) programs in Wyoming. Risks from batterers include economic control resulting in loss of security, housing and income. Women fleeing violent homes often don't have the resources to establish themselves. Affordable housing is critical in the struggle to end domestic violence. Little public housing is available in Wyoming's more rural areas. A few DV/SA programs are establishing transitional housing units to address this need. However, lack of stable funding prevents most from this important work.

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IN THE

Supreme Court of the United States

UNITED STATES DEP'T OF HOUSING & URBAN DEVELOPMENT,

Petitioner,

- and -

OAKLAND HOUSING AUTHORITY,

Petitioner,

v.

PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE, and BARBARA HILL,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CENTER FOR THE COMMUNITY INTEREST IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Center for the Community Interest ("CCI") is a national, not-for-profit organization dedicated to public safety and urban quality of life.[1] CCI works with public officials and community groups across the country to develop and defend policies that strike a common-sense balance between the rights of the individual and the needs of the larger community, *e.g.*, "Megan's Law" (notifying communities of released sex offenders in proximity), traffic sobriety checkpoints, and the "One Strike" eviction rule at issue in this case.

Through its National Neighborhood Safety Legal Network, CCI has organized and provided legal advice to hundreds of citizens groups across the nation, and has developed nationally recognized expertise on legal issues affecting the safety and quality of life of communities. CCI has participated in a wide range of public safety and quality of life cases before this Court and other courts throughout the country, and has developed model legislation, policies, and Internet resources that help communities address problems such as illegal gangs, disorder in public spaces, nuisance properties, open-air drug markets, and adult businesses in residential neighborhoods. Most recently, CCI participated as amicus curiae before this Court in *United States v. Knights*, No. 00–1260 (2001) (defending suspicionless and warrantless searches incident to probation); *Dickerson v. United States*, 530 U.S. 428 (2000) (supporting

1. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amicus and its counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief and their letters of consent are being Lodged herewith.

admissibility of voluntary confessions given in the absence of Miranda warnings); *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (defending warrantless and suspicionless searches incident to parole); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (defending civil commitment of certain dangerous sex offenders); *Montana v. Egelhoff*, 518 U.S. 37 (1996) (supporting reasonable restrictions on criminal defenses available to drunk drivers); and *Bennis v. Michigan*, 516 U.S. 442 (1996) (defending asset-forfeiture programs to control street prostitution). CCI has the consent of all parties to this case to file this amicus brief in support of Petitioners.

With respect specifically to public housing policies, CCI intervened on behalf of the elected leaders of New York City's public housing tenants in *Escalera v. New York Hous. Auth.*, 924 F. Supp. 1323 (S.D.N.Y. 1996). CCI urged the *Escalera* court to modify a 1971 consent decree to allow the Housing Authority to pursue a "One Strike" eviction policy. CCI also intervened on behalf of tenants in Chicago to defend police searches for illegal drugs and weapons in public housing projects plagued by gang violence. *See Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994). In the past year, CCI has represented a Pennsylvania housing authority in filing a petition for certiorari asking this Court to review a decision of the Pennsylvania Supreme Court that undermined the One-Strike rule. *See Delaware County Hous. Auth. v. Bishop*, *cert. denied*, 149 L. Ed. 2d 502 (Apr. 16, 2001) (No. 00–1272).

In addition, CCI participated as an amicus in support of Petitioners' original appeal in this matter to the Ninth Circuit. The original three-judge panel cited one of CCI's articles in its opinion reversing the decision of the trial court. *See Rucker*

v. Davis, 203 F.3d 627, 631 (9th Cir. 2000) (citing Dennis Saffran, *Public Housing Safety Versus Tenants' Rights*, 6 THE RESPONSIVE COMMUNITY 34 (Fall 1996)), *vacated*, 222 F.3d 614 (9th Cir. 2000). That article was one of several that CCI staff and board members have published on the problem of crime and drugs in public housing. *See also* Dennis Saffran & Eliot Spitzer, *When Housing Tenants Commit Crimes*, N.Y. DAILY NEWS, Aug. 25, 1996, at op-ed page.

CCI is extremely concerned that the decision of the Ninth Circuit in this case, if ratified by this Court, would dangerously restrict the ability of local housing authorities to protect residents from criminal activity. This would undermine recent advances in promoting safety and lawful behavior in public housing communities, thereby placing law-abiding tenants and their families at increased risk of crime, and generally degrading the quality of life of public housing residents across the nation.

SUMMARY OF ARGUMENT

At first blush, this case seems to present a classic conflict between the application of a statute's plain language, on the one hand, and a creative judicial construction, motivated by sympathy, to avoid the harsh effects of that language on an impoverished and disempowered segment of society. But that conflict is false: in fact, the unwillingness of the Ninth Circuit's *en banc* majority to apply the clear language of 42 U.S.C. § 1437d(*l*)(6) will harshly disserve the innocent, law-abiding residents of public housing projects whom the court sought to protect. This fact motivated not only the four dissenting judges, but a very recent opinion in which a unanimous Eleventh Circuit panel "follow[ed] the lead of

Judge Joseph Sneed, as set forth in his comprehensive dissent in *Rucker*," and held that the plain language of Section 1437d(*l*)(6) foreclosed claims identical to Respondents'. *Burton v Tampa Hous. Auth.*, No. 00–13607, 2001 WL 1379724, at *2 (11th Cir. Nov. 7, 2001).

When the Department of Housing and Urban Development issued regulations that closely track the text of section 1437d(*l*)(6), it did not ignore a specific Congressional intent expressed solely in *other* statutory provisions and in the legislative history of an unenacted version of section 1437d(*l*)(6). Instead, the Department properly implemented two Congressional determinations about public housing, and about the local housing authorities responsible for its residents' safety.

The first is that such authorities should require tenants to accept, in their leases, a share of responsibility for helping reduce the drug-related crime that threatens to overwhelm many projects. The second is that the federal government should entrust local housing authorities with discretion to enforce those lease provisions after any such crime. Such entrustment accords with the general federal housing policy to maximize the responsibility vested in local housing authorities. *See* 42 U.S.C. § 1437.

Those local authorities should not have to devote their very limited resources to the daunting task of proving, with no prosecutorial powers, a case of negligence or conspiracy against a tenant when the dispositive issue of knowledge will almost always be a disputed factual question. While the majority opinion below seems only to interpolate an equitably appealing "innocent tenant" defense into the plain language

of the statute, its rule will in practical reality gravely undermine Petitioner's "One Strike And You're Out" policy to reduce crime, and protect tenants, in public housing. DEP'T OF HOUSING AND URBAN DEVELOPMENT, "*One Strike and You're Out" Policy in Public Housing* 1 (March 1996). The results of applying the plain language of section 1437d(*l*)(6) are neither absurd nor potentially unconstitutional, but instead serve sound public policy.

Turning from the level of policy analysis to that of administrative law and statutory interpretation, both an initial reading and careful scrutiny of section 1437d(*l*)(6) make clear what the Ninth Circuit *en banc* majority has done, and why. Troubled by the results, in some cases, of enforcing lease provisions dictated by regulations that, in turn, closely track a clearly worded statute, the majority struggled to perceive some ambiguity or gap in the statutory text that would allow it to deploy other tools of statutory construction, and so manufacture a Congressional intent contrary to the clear import of the text. While the *en banc* majority made arguments about that text, its history, and related provisions, the majority's belief that applying the statute literally would be so harsh as to be "absurd" plainly drove its effort to avoid the obvious reading of the section. The majority's sympathy for evicted tenants is understandable. Its concerns, however, are not only misguided at the practical and policy level, but could not in any event support its wholesale reconstruction of a statute whose language is, as the *Burton* court noted, "unmistakably clear." 2001 WL 1379724, at *2.

The fact that this case involves an agency's interpretation of that language made the Ninth Circuit's judicial reconstruction particularly difficult. It is well-settled that, when an agency charged with enforcing a statute has arrived

at and implemented a "permissible construction," a court may not substitute its judgment for that of the agency. *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Under *Chevron*, a court must first determine whether Congress has "directly spoken to the precise question at issue," in which case its intent governs. *Id.* at 842–43. If not, the court must decide if the agency's interpretation of an ambiguous provision, or filling of a statutory gap, is sufficiently reasonable and faithful to the statutory purpose not to be arbitrary. *Id.* at 843. Those two strictures required the *en banc* majority in this case to navigate a tortuous path between the clarity of the statutory text, on the one hand, and the closeness with which the implementing regulations track that text, on the other.

Specifically, *Chevron* required the *en banc* majority to make two inherently contradictory interpretive maneuvers. First, the majority had to contrive ambiguity into the statute's plain language, so as to avoid at *Chevron*'s first step the obvious (and correct) conclusion that Congress has "directly spoken to the precise question" in this case by mandating eviction for "any drug-related criminal activity," without mentioning any exception based on a tenant's lack of knowledge or fault. Immediately after finding the plain language ambiguous, the majority then had to use other tools of statutory construction to avoid proceeding to *Chevron*'s second step. At that second step, of course, the majority would have had to defer to HUD's plainly reasonable (indeed, almost mirror-image) construction of the statute.

Instead, the *en banc* majority assembled a melange of statutory-construction arguments based on other statutory sections, a Committee report on an unenacted version of the law at issue, and the court's view that applying the law

literally would yield "absurd" results and raise constitutional questions. It then concluded that Congress had "directly spoken to the precise question at issue" after all (albeit not in the statute's text) and had in fact expressed a specific intent diametrically opposed to that shown by the text. The *en banc* majority thereby evaded the need even to consider the reasonableness of the implementing agency's interpretation of the statute.

The majority below was right that there is no need to consider the reasonableness of HUD's interpretation, but that is because, as the dissent and the *Burton* court recognized, "HUD's interpretation is the only permissible construction of the statute." *Burton*, 2001 WL 1379724, at *2. Even were that not so, however, HUD's interpretation would be an eminently reasonably one entitled to deference under *Chevron*.

The dissenting judges below, the *Burton* court, and Petitioners in their briefs to this Court comprehensively analyze the *en banc* majority's failure to show ambiguity in the plain language of section 1437d(*l*)(6), or to show a clear expression of Congressional intent in other sections of the public-housing laws. CCI's focus accordingly is on examining all of the section's legislative history, and the challenging realities of efforts by PHAs with limited resources to combat drug-related crime in public housing.

ARGUMENT

I.

THE FULL LEGISLATIVE HISTORY OF SECTION 1437d(*l*)(6) AND ITS IMPLEMENTING REGULATIONS DEMONSTRATES THE VALIDITY OF THE REGULATIONS.

A general review of the history of the Acts that created and amended section 1437d(*l*)(6), and of HUD's promulgation of regulations to implement the section, makes clear Congress' intent to confer broad discretion on public housing authorities to enforce provisions, strictly when necessary, that make tenants responsible for helping stem the tide of drug-related crime. Before undertaking that review, however, we note how the court below misconstrued both the import and the weight of the lone fragment of legislative history that it addressed.

A. The Ninth Circuit's Legislative History Argument.

The *en banc* majority narrowly focused its discussion of legislative history on what it described as one of the "committee reports accompanying the statute" that amended section 1437d(*l*)(6) in 1990. *Rucker v. Davis*, 237 F.3d 1113, 1123 (9th Cir. 2000) ("*Rucker II*") (acknowledging that report concerned section's 1990 amendment, not its 1988 enactment); *see generally* discussion of legislative history *infra*. In that report, a Senate Committee noted its "anticipat[ion] that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the [public housing authority (PHA)] and the eviction court" and added, as an example, that "eviction would not

be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps . . . to prevent the activity." S. REP. No. 101–316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941. While acknowledging that PHAs "have discretion in deciding whether to initiate an eviction action under the statute" (*Rucker II*, 237 F.3d at 1123), the court suggested that such discretion can only apply in cases of culpable tenants, and concluded that, in the report, "Congress specifically rejects the notion that the PHAs' discretion is so broad that it extends to the eviction of innocent tenants." *Id.*

The Ninth Circuit's conclusion is flawed in two respects. *First*, the report did not deny that PHAs have discretion to evict "innocent tenants." In suggesting that such evictions would not be "appropriate," the report necessarily implied that they would be authorized. If the statute simply forbade such evictions, the committee would have had no need to comment on whether they would be "appropriate." It would have simply noted instead that they were unauthorized or forbidden. The report's reference to the need for PHAs to "exercise . . . humane judgment" simply is not limited to cases of "culpable tenants." Indeed, while the court posited a binary distinction between "innocent" and "culpable" tenants, a significant part of an actual PHA's exercise of judgment in real cases lies in deciding how to evaluate tenants whose circumstances place them at various points on a spectrum of which "innocent" and "culpable" are the abstract endpoints.

Second, "Congress" did not accept or reject *any* notion in the report quoted by the court. In stating to the contrary, the court failed to note that the Senate committee report it quoted had discussed a Senate bill that differed from that

enacted by the 1990 Congress—and that would have made it harder for PHAs to show cause for eviction for drug-related crimes. *See* 136 Cong. Rec. 15,991, 16,012 (1990) (reproducing S.566, 101st Cong., 2d Sess. §§ 521(f) and 714(a) (1990) as passed by the Senate). The Conference Report rejected the Senate bill's language and instead adopted the plain language, now codified in section 1437d(*l*)(6), that unqualifiedly authorizes evictions for "any drug-related criminal activity." *See* H.R. CONF. REP. No. 943, at 418 (1990); *see also Hous. Auth. v. Green*, 657 So. 2d 552, 554 (La. App. 1995) ("That a Congressional committee may not have intended for tenant evictions to take place in the absence of knowledge does not change the fact that when the Congress as a whole enacted this law it did so without the imposition of a knowledge requirement").

This Court will of course review the entire history of section 1437d(*l*)(6)'s initial enactment, HUD's creation of implementing regulations, and Congress' later amendments strengthening the section, instead of just one passage from a Senate report on an unenacted version of one such amendment. This full consideration will show why Congress intended to endow PHAs with broad discretion to evict tenants, in those cases in which the authorities find it appropriate, for "any drug-related crime" by the tenant's household members, guests, or other persons under their control. By mandating that public housing leases contain provisions affording PHAs that discretion, as several state courts have noted in affirming evictions based on such provisions, "'Congress enacted a straightforward practical method of dealing with a serious public safety problem.'" *Syracuse Hous. Auth. v. Boule*, 701 N.Y.S.2d 541, 542 (App. Div. 4th Dep't 1999) (quoting *City of S. San Francisco Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367, 371 (Cal. App. Dep't Super. Ct. 1995)).

B. The Complete Legislative History Of Section 1437d(*l*)(6).

In 1988, facing a crisis of drug-related crime and violence in public housing projects, Congress took decisive steps toward improving living conditions in such housing. Beginning with the observations that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," and that "public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime" (42 U.S.C. § 11901(1)–(2)), Congress decided to create an efficient mechanism for ridding public housing of those who sell or use drugs or commit other dangerous crimes.

Using unmistakably clear language, based on reasonable findings as to its necessity,[2] Congress made criminal activity

2. Congress made three other related findings:

> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reductions in Federal aid to cities.
>
> (42 U.S.C. § 11901(3)–(5))

by a public housing tenant or a member of the tenant's household a sufficient ground for eviction. Specifically, Congress required all local housing authorities to use leases that

> provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy. (42 U.S.C. § 1437d(*l*)(5) (1989))

Two years later, after hearings in which opponents of the rule urged Congress to modify it to require PHAs to prove a tenant's knowledge and control of the wrongdoer,[3] Congress not only declined to make such changes, but instead clarified the requirement by making it apply to "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity." 42 U.S.C. § 1437d(*l*)(5) (1991).[4] That it made such

3. *See Drugs in Federally Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101–234, at 90–91 (1989) (testimony by Associate Director of the ACLU); *see also id.* at 86–87 (pointing to several cases in which ignorant tenants had been subjected to eviction proceedings); *Public Housing Aides Push to Evict Drug Users, Sometimes Violating the Rights of Other Tenants*, WALL ST. J., July 6, 1989 at A12.

4. *See* Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101–625, § 504, 104 Stat. 4185 (1990). In 1996, Congress replaced the phrase "on or near such premises" with "on or off such premises." 42 U.S.C. § 1437d(*l*)(5) (1997). In 1998, the section was redesignated as subsection (*l*)(6). *Id.* (1999).

a change after receiving testimony urging it instead to adopt the rule imposed by the Ninth Circuit makes clear that "Congress specifically considered the ramifications of the statute, and intended precisely what the plain reading . . . entails." *Burton*, 2001 WL 1379724, at *5 (discussing ACLU testimony).

HUD then promulgated regulations to implement this requirement that tenants take responsibility for helping to curtail crime. Housing and Urban Development Lease Requirements, 24 C.F.R. § 966.4(*l*)(2)(ii) (1993), 56 Fed. Reg. 51,560, 51,578 (1991). In so doing, HUD recognized Congress' determination that drug-related crime by household members poses "a special danger to the security and general benefit of public housing residents warranting special mention in the law," and that Congress had thus "specified that these types of criminal activity by household members are grounds for termination of tenancy without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated violation or other good cause for eviction." 56 Fed. Reg. 51,566–51,567 (1991).

Like the controlling statute, the implementing regulations require local housing authorities to secure leases from each of their tenants in which the tenant promises

> [t]o assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or

> (B) Any drug-related criminal activity on or near such premises.
>
> Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit. (24 C.F.R. § 966.4(f)(12)(i))

In formulating these regulations, HUD considered comments by legal aid and tenant organizations similar to those received by Congress in 1989, *i.e.*, that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household" and "should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, . . . did not participate, give consent or approve the criminal activity, or . . . [did] everything 'reasonable' to control the criminal activity." 56 Fed. Reg. 51,560, 51,566 (1991). As Congress had done, HUD ultimately decided not to accept these suggestions. Instead, following the statute, which contained no such caveat, HUD stated quite explicitly that a tenant "should not be excused from contractual responsibility by arguing that [he or she] did not know, could not foresee, or could not control behavior by other occupants of the unit." *Id.* at 51,567.

While the regulation clearly grants PHAs the power to evict the "innocent tenant" because of the acts of others, it also emphasizes that PHAs have discretion in the exercise of that power:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the

> circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. (24 C.F.R. § 966.4(*l*)(5)(1))

Beyond specifying factors to consider in exercising its discretion, the regulations note different remedies short of eviction that a PHA has the option to employ, like "permit[ing] continued occupancy by remaining family members and . . . impos[ing] a condition that family members who engaged in the proscribed activity will not reside in the unit," or "requir[ing] a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit." *Id.*

HUD offered several reasons for its decision. First, it noted that holding tenants contractually responsible for the acts of anyone occupying a unit is "a conventional incident of tenant responsibility under normal landlord-tenant law and practice," and a "valuable tool for management of the housing." 56 Fed. Reg. 51,560, at 51,567. Second, HUD recognized that allowing tenants to escape eviction by claiming ignorance "would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members" and "thereby undercut the tenant's motivation to prevent [such] activity." *Id.* Third, PHAs may often have difficulty proving in court that the leaseholder knew or had control over the offender, thus making it time-consuming and costly to evict households causing drug-related problems. *Id.* Regardless of fault, as HUD noted, "a family which does not or cannot control drug crime, or other criminal

activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." *Id.*

HUD's conclusions properly acknowledged a grave reality. The seemingly intractable problem of crime, especially drug-related crime, has long victimized law-abiding tenants of public housing. The pervasiveness of drugs and drug-related crime has caused families who cannot afford to move elsewhere to live in fear for their own safety and that of their children. *The Drug Problem and Public Housing: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, H.R. REP. No. 101-1019 (1989) (testimony of Nancy Brown, Chairperson, State of Connecticut Task Force on Public Housing and Drugs). The dramatic decline in violent crime enjoyed in recent years in many areas of the country has not fully reached impoverished, inner-city neighborhoods. Those who are too poor to move from those areas "must walk the streets that the rest of us can avoid or never confront. For crime-plagued inner-city housing tenants, the only real choice is between being homeless and coping with crime." *Crime in America: Three Ways to Prevent It, Hearings on H.R. 3 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1995 WL 20741, at 9 (Jan. 20, 1995) (statement of John J. Dilulio, Jr., professor of politics and public affairs at Princeton University and Director of the Brookings Institution's Center for Public Management). Too often, efforts to improve the quality of life in these poorest of neighborhoods, including efforts to evict drug dealers, are stymied by legal challenges. *Id.*

Despite the severity of this problem, housing authorities in many areas of the country began to make significant

inroads in the 1990s toward making public housing safer for law-abiding residents. Eviction of tenants who engage in drug-related activity, or whose guests or household members do so, formed a significant part of a comprehensive—and successful—crime-fighting strategy. In Toledo, Ohio, drug-related crimes declined 24% and other crimes 69% in the first year after the Toledo Housing Authority adopted such a policy. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra*, at 13. In Greensboro, North Carolina, the housing authority reported a stunning 60% drop in drug arrests over four years as a result of a comprehensive strategy of community policing, increased police involvement in screening applicants and reporting drug crimes to the authority, and a strict-liability eviction policy like the one at issue here. *Id.* at 13–14.

Given the success of these programs, it is not surprising that Congress would wish to implement them on a national scale. In March 1996, four and a half years after HUD promulgated its first regulations, President Clinton signed the Housing Opportunity Program Extension ("HOPE") Act of 1996, which strengthened PHAs' ability to screen out and evict drug dealers and other criminals who prey on their law-abiding neighbors. Pub. L. No. 104–120, § 9, 110 Stat. 834, 836 (1996). President Clinton announced a "One Strike And You're Out" policy encouraging housing authorities to fully use these new powers. *See Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing*, 32 WEEKLY COMP. PRES. DOC. 582, 582–85 (Mar. 27, 1996); *Address Before a Joint Session of the Congress on the State of the Union*, 32 WEEKLY COMP. PRES. DOC. 90, 94 (Jan. 23, 1996) ("I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule

for residents who commit crime and peddle drugs should be one strike and you're out"). The "One Strike" policy partly bases an authority's receipt of federal funds on its use of leases that clearly make any drug-related or other serious crime by a household member grounds for eviction. DEP'T OF HOUSING & URBAN DEVELOPMENT, *supra*, at 3–4, 7.

In implementing its "One-Strike" policy, HUD noted the success of such policies in achieving the regulations' primary goal—the safety of law-abiding tenants:

> At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules. There are many eligible, law-abiding families who are waiting to live in public and assisted housing and who would readily replace evicted tenants. By refusing to evict or screen out problem tenants, we are unjustly denying responsible and deserving low-income families access to housing and are jeopardizing the community and safety of existing residents who abide by the terms of their lease. (*Id.* at 4)

In promulgating the "One-Strike" policy, then–HUD Secretary Henry Cisneros identified "the number one group of people" demanding such a policy: "[public housing] residents themselves," who had been forced to "put children to sleep in bathtubs" and otherwise abandon their rights and dignity because of ambient violence created by armed drug dealers, and intimidation and oppression visited on tenants who opposed them. D. Saffran, *supra*, at 34.

Responding to concern about innocent family members who might face eviction because of a household member's crimes, the President and the Secretary noted that this "innocent grandmother" argument ignores a crucial reality: Public housing is a scarce resource available only to a fraction of the poor people who desperately need it. DEP'T OF HOUSING & URBAN DEVELOPMENT, *supra*, at 4. For every unit of public housing, three poor families are on the waiting list, the vast majority of whom are fully law-abiding and would not endanger other tenants. D. Saffran, *supra*, at 35. Or, as President Clinton said in announcing the "One-Strike" policy: "The people who are living [in public housing] deserve to be protected, and the good people who want to live [there] deserve to have a chance," making it wrong to allow households that harbor criminals or have proven unable to prevent crime by members or guests "to use up homes that could make a big difference in the lives of decent families." *See id.* at 36.

Beside giving housing authorities an effective tool for combating crime in public housing, the HUD regulation promotes the struggle against drug-related crime within families themselves. As noted during floor debate on the Anti-Drug Abuse Act of 1988, too often those engaged in drug-related activity have used the homes of family members and friends as a base of operations. Because they themselves were not on the lease, these individuals previously operated without fear of eviction. 134 CONG. REC. H11108, H11109 (1988) (remarks of Rep. Wylie). Instead of pulling households apart, the lease provision permitting eviction of the entire household encourages families to confront the problems of crime and drugs in their midst. By requiring household members to assume responsibility for their own acts and those of the people they invite into their home, the lease provision

promotes action by the individuals closest to those engaging in criminal activity, at a level where such action is likely to be most effective.

CCI sympathizes with those tenants who, despite being ignorant of their relatives' or guests' wrongdoing, face eviction from their homes. But the most important question is not whether they have been completely innocent or tacitly acquiescent, but rather how society should allocate scarce housing resources in order to do the most good and cause the least suffering to its most vulnerable members. Moreover, we urge the Court to recognize that it is far from uncommon for innocent tenants to be evicted from private housing for violations of their leases based on the illegal activity, or even the non-criminal misconduct, of their relatives and guests—on the theory that they have a contractual obligation to prevent such activities in or near their homes by persons under their control. "The government, given its status as a landlord, must be given the authority to maintain its property at a habitable and safe standard for all of its tenants." *Burton*, 2001 WL 1379724, at *2. Such a practice *can* have a harsh impact on the blameless relatives of troublemaking youth, but it allows the rest of the children in a community to grow up in decent, safe and nurturing surroundings. The "One-Strike" policy extends this same protection to children growing up in public housing projects.

II.

PETITIONERS' STRAIGHTFORWARD APPLICATION OF THE PLAIN LANGUAGE OF SECTION 1437d(*l*)(6) DOES NOT YIELD "ABSURD" RESULTS.

Section 1437d(*l*)(6) gives Petitioner the Oakland Housing Authority (and similar local authorities around the nation) an essential, effective weapon to protect the public housing community for which it is responsible. The section's grant of authority and discretion to the local authority reflects one of the fundamental tenets of federal housing law: "to vest in public housing agencies . . . the maximum amount of responsibility and flexibility in program administration." 42 U.S.C. § 1437 (Declaration of Policy). The dissenting judges below noted that such localization of power was one purpose of § 1437d(*l*)(6). *Rucker II*, 237 F.3d at 1133 (Sneed, J., dissenting) (quoting floor debate).

The devolution of power and responsibility effected by section 1437d(*l*)(6) runs not only from federal to local authorities. The section also makes each family within a public housing community share the responsibility for curtailing drug crimes. By treating the household as a unit, the lease provisions required by HUD's regulation give tenants an incentive to confront and deal with household members who use drugs or commit other crimes, rather than enabling and harboring, or just turning a blind eye toward, such conduct. The results of HUD's straightforward application of a provision that has proven effective at removing drug dealers from public housing, by eliminating their base of operations, are far from absurd. The challenged regulation instead carries out Congress' intent to allocate scarce public housing funds preferentially to families that

successfully avoid or eliminate drug-related activity in and around their homes. Such a result is eminently sensible.

The court below nonetheless held otherwise. The Ninth Circuit improperly concluded that this was the sort of exceptional case in which to assume that Congress, despite having drafted a seemingly clear statute, cannot have meant what it said because the results of applying its plain language would be "absurd." *Rucker II*, 237 F.3d at 1124 (citing *United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994)). The court found it necessary to "look no further than the facts of this case," noting HUD's concession at argument that, while Respondent Pearlie Rucker could have done no more to protect herself from eviction, the statute "authorized her eviction nonetheless." *Id.* This is not an "absurd result," however, because the statute merely "authorized" that eviction; it did not compel it. The challenged regulations expressly accord local housing authorities "discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity." 24 C.F.R. § 966.4(*l*)(5)(i). Indeed, as the dissent below noted, this case in fact illustrates the importance of that discretion, as the OHA decided "[i]n an exercise of its 'humane judgment' . . . not to seek the eviction of plaintiff Rucker." *Rucker II*, 237 F.3d at 1137 n.13.

Looking beyond the facts of Ms. Rucker's individual case, the misplacement of the court's "absurd results" argument becomes clear when one focuses on the only actual "result" of the statutory and regulatory framework at issue. That result is to subject public housing tenants, if they fail to prevent drug-related crimes by persons staying with them,

to the *discretion* of the local housing authority that is responsible for their community.

In exercising that discretion, the local authority is expressly empowered to consider all circumstances of a tenant's case in deciding whether to enforce a contractual eviction term. 24 C.F.R. § 966.4(*l*)(5)(l); *see also Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 702-703 (Minn. 1999) (approvingly noting that, "[u]nder HUD regulations, PHAs retain the discretion to craft eviction policies that protect other PHA tenants and the larger community while allowing for consideration of individual circumstances"). If the statute and regulations *mandated* eviction of "innocent tenants" in some or all cases, their results might be deemed "absurd." But the result of entrusting that decision to local housing authorities, rather than state or federal courts, plainly is not. *See Lor*, 591 N.W.2d at 702–704 (delineating respective roles of PHAs and state eviction courts). Such devolution of authority reflects Congress' express policy for federally assisted public housing. *See* 42 U.S.C. § 1437 (quoted *supra*).

The "absurd results" argument improperly presumes that local housing authorities will abuse that discretion with sufficient frequency that the result of the regulations' operation—*i.e.*, conferring that discretion—is absurd. Other than its misguided invocation of Ms. Rucker's situation, the court did not point to any evidence that local housing authorities have actually sought to evict tenants based on the sort of hypothetical, hypertechnical violations the opinion posited. *See, e.g., Rucker II*, 237 F.3d at 1124 (imagining eviction based on household member's drug conviction years before). The implicit assumption—that local housing authorities will enforce the requisite lease provisions like sadistic robots—is groundless.

In reality, vesting discretion in local housing authorities to evict tenants who fail to prevent their household members or guests from committing drug-related crimes, without requiring those authorities to prove in court that such tenants were reckless or negligent, serves vital interests besides devolving authority. The dissenting judges below ably explained the tremendous practical difficulties of proving in court that a tenant knew or recklessly avoided learning of a household member's criminal activity. *See id.* at 1135-37 (Sneed, J., dissenting). The only parties likely to be able to offer competent evidence on the issue are the household member and tenant, who are unlikely to cooperate, and, in some cases, other residents of the public housing project. *See id.* at 1136. But lengthy eviction procedures afford drug dealers ample time to intimidate such potential witnesses, making evictions impossible.

Such intimidation completes a vicious cycle. Drug dealers entrench themselves in public-housing communities, terrorize the majority of law-abiding residents, and then exploit legal procedures to thwart housing authorities' attempts to remove them, perfecting the intimidation and dispiritment of law-abiding residents. The latter's rational self-interest, finally, leads them to view housing authorities as "'paper tigers'" unable to help or protect them, and with whom it is unsafe to cooperate. *Id.* at 1136 (Sneed, J., dissenting) (quoting 134 Cong. Rec. at E1965–02 (June 14, 1988)). In trying to regain the trust and cooperation of such residents for the task of making public housing safe and livable, "Congress was aware . . . that success could only be reached by ridding these public housing units of the drug-related criminal activity, and giving the law-abiding tenants control over their living situations." *Burton*, 2001 WL 1379724, at *7; *see also Drugs in Federally*

Assisted Housing: Hearings on S.566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, S. Doc. No. 101–234, at 27 (1989) (testimony of Mayor of Alexandria, Va.) (describing eviction provision as critical to "giv[ing] a sense of control back to the tenant leadership within communities"); DEP'T OF HOUSING AND URBAN DEVELOPMENT, *supra*, at 13–14 (recounting how one "One Strike" program increased significantly the percentage of residents who felt safe living in public housing, while another reduced by almost 90% the vacancy rate, which officials attributed to improved sense of safety). On their own, local housing authorities simply lack the necessary resources and prosecutorial powers to combat in court armed criminals willing and readily able to intimidate potential witnesses.

CONCLUSION

Applying the regulations invalidated by the court below implements Congress' intent to vest power in local housing authorities. That power is tempered by discretion to consider all the circumstances of innocent tenants' cases and refrain from evicting them. That result is not absurd, but essential to the sound public policies that underlay the regulations and the statute authorizing them.

DATED: November 20, 2001.

Respectfully submitted,

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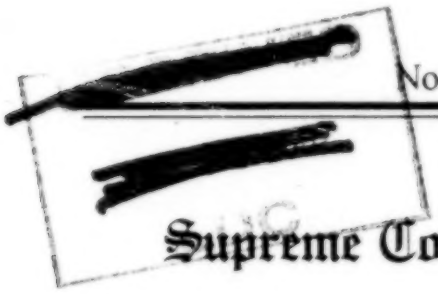

Nos. 00-1770, 00-1781

DEC 20 2001

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

- and -

OAKLAND HOUSING AUTHORITY, *et al.*,

Petitioners,

v.

PEARLIE RUCKER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE COALITION TO PROTECT PUBLIC HOUSING, THE UNITED COMMUNITY HOUSING COALITION, THE PUBLIC HOUSING RESIDENT NETWORK, COMMUNITY ALLIANCE OF TENANTS AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

The Coalition to Protect Public Housing ("CPPH") is a Chicago-based advocacy group comprising public housing residents, community-based organizations, religious institutions, businesses, and non-profit organizations. Members include the Community Renewal Society, Chicago Coalition for the Homeless, Jewish Council on Urban Affairs, and Metropolitan Tenants Organization. Through public education and demonstration, collaboration with an interfaith network, and direct negotiation with officials at the Chicago Housing Authority and the United States Department of Housing and Urban Development ("HUD"), CPPH seeks to protect the rights of Chicago public housing residents and to ensure the future of public housing. Since its creation by public housing residents in 1996, the CPPH has sought to ensure the fair treatment of residents by government agencies that develop and administer public housing policies.

The United Community Housing Coalition ("UCHC") in Detroit, Michigan is a charitable, non-profit housing advocacy organization with a membership composed primarily of low-income tenants and homeowners. Since 1974, the UCHC has advocated on behalf of housing-needy, homeless, and low-income households to eliminate and prevent homelessness, and to protect the rights of poor tenants and homeowners, often on the brink of eviction and homelessness. In an effort to prevent homelessness, the UCHC provides advice and counsel to indigent defendants in eviction proceedings, assisting thousands of tenants annually. In addition to direct representation and

[1] The parties have consented to the filing of this brief. The consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* The Coalition to Protect Public Housing, The United Community Housing Coalition, The Public Housing Resident Network, Community Alliance of Tenants and NOW Legal Defense and Education Fund state that the counsel named below authored this brief in its entirety, and no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

counseling, the UCHC has acted as a class action plaintiff in a case that successfully challenged HUD's vacant single-family inventory practices, *Lee v. Pierce*, 698 F. Supp. 332 (D.D.C. 1988), and as *amicus* in several Michigan cases relating to tenants' rights, including *Pittsfield Village, Inc. v. Riester*, 434 Mich. 910 (1990), *Hovanesian v. Nam*, 213 Mich. App. 231, 539 N.W.2d 557 (1995) and *De Bruyn Produce Co. v. Romero*, 202 Mich. App. 92, 508 N.W.2d 150 (1993), *appeal denied*, 447 Mich. 994, 525 N.W.2d 455 (1994). UCHC is dedicated to protecting the rights and property interests of low-income tenants.

The Public Housing Resident Network ("PHRN") is a statewide resident organization that assists residents of public housing in Connecticut. The PHRN provides training to strengthen resident associations, raises awareness of new laws and regulations among residents, and assists residents in becoming active participants in the decision making of their local housing authority. Founded in 1996, the PHRN is open to participation by any public housing resident — whether elected leadership or interested citizen. The PHRN is committed to enabling public housing residents to have a voice in the policies that affect them.

The Community Alliance of Tenants ("CAT") in Portland, Oregon is a tenant-controlled membership organization. Its mission is to educate and empower tenants to promote affordable, stable and safe rental homes. Recognizing that there is a growing shortage of affordable housing in Oregon, the CAT seeks to improve low-income renters' bargaining power with landlords. In particular, the CAT brings tenants together to organize and collectively work for fair and equal protection in housing policy and practice, providing a forum for low-income renters to take leadership in identifying and solving the problems faced by Portland's community of low-income tenants. The CAT is committed to ensuring fair treatment of all tenants, including those who live in public housing.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that for over thirty years has used the power of the law to define and defend women's rights. NOW Legal Defense has frequently appeared as counsel before this Court. *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001); *United States v. Morrison*, 529 U.S. 598 (2000). NOW Legal Defense has litigated to protect the rights of survivors of domestic and sexual violence and eliminate policies that discriminate against them in housing, government benefits, and employment. *See, e.g., Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999); *Valdez v. Truss Components, Inc.*, No. 98-310-RE, slip op. (D. Or. Aug. 19, 1999); *United States & Alvera v. C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. filed June 8, 2001); *Apessos v. Memorial Press Group*, No. PLCV2001-01474 (Mass. Super. Ct. filed Dec. 10, 2001). NOW Legal Defense has a long-standing commitment to eliminating discrimination in all places of public accommodation including housing.

SUMMARY OF THE ARGUMENT

A leitmotif running through petitioners' briefs is the discretion to do justice that Congress vested in PHAs ("PHAs"). For example, petitioners argue that the one-strike provision codified in 42 U.S.C. § 1437d(l)(6) is perfectly rational, even without an innocent tenant defense, because PHAs will exercise their discretion not to evict truly innocent tenants. The crux of this argument is that discretion works; it allows PHAs to achieve the desired result of keeping public housing crime-free, while at the same time protecting public housing tenants against unfair treatment.

Amici attest otherwise. As numerous cases demonstrate, law-abiding tenants of public housing routinely get evicted through no fault of their own. PHAs have invoked the one-strike policy to evict tenants who were the victims of crimes committed in their homes by uninvited guests. They have often relied on the one-strike policy to evict a tenant because of the misdeed of

a family member even though the tenant had taken all precautions to keep that family member out of her home. PHAs have often used the one-strike policy to evict a family for the unpredictable and uncharacteristic act of a child, even when it is unlikely that the act will be repeated. They have even used the one-strike policy to evict tenants for minor infractions committed by someone beyond their control. This record of draconian enforcement belies petitioners' argument that discretion works. Discretion, as applied by PHAs nationwide, provides little comfort to public housing tenants who live in fear that they will be evicted for actions committed by others. The humane judgment on which petitioners build their case is theoretical at best.

The zealousness with which PHAs have been pursuing eviction of innocent tenants is undoubtedly attributable, to some degree, to the incentives that HUD has developed. Both HUD's rhetoric and philosophy and the structures by which HUD allocates certain funds reward PHAs for the number of one-strike evictions they successfully pursue.

In the end, only an innocent tenant defense will save the one-strike provision from yielding results that are absurd and unjust.

ARGUMENT

HUD's Rejection Of An Innocent Tenant Defense Cannot Be Justified By The Repeated Argument That PHAs Theoretically Have The Discretion To Decline To Evict Innocent Tenants And Have No Incentive To Evict Them.

One theme pervades petitioners' briefs more than any other: Discretion. At almost every turn in their statutory construction arguments, HUD and the Oakland Housing Authority ("OHA") resort to some version of the argument that 42 U.S.C. § 1437d(l)(6) — the "one-strike" provision — is not nearly as draconian as it seems. After all, the discretion argument goes, every PHA has the discretion not to evict an innocent tenant in the interest of justice. The theme rears its head frequently enough, and with sufficient primacy, to confirm that petitioners

view this discretion argument as a lynchpin of their case, or (to use OHA's phrase) as "critical." Yet, the actual practice of PHAs nationwide, as evidenced by numerous eviction proceedings, belies petitioners' position on this central argument. Whether because PHAs have internalized HUD's message that the one-strike provision is meant to set a level of zero tolerance or because HUD has developed structural incentives to encourage PHAs to evict innocent tenants, the end result is clear: The one-strike provision without an innocent tenant defense yields results that are unjust and so absurd as to raise doubts that Congress could ever have intended such a reading.

A. Petitioners Have Erected Their Case Around The "Critical" Proposition That PHAs Typically Exercise Their Discretion Not To Evict Truly Innocent Tenants.

One need look no further than the first substantive sentence of HUD's Summary of Argument to appreciate the central role the theme of discretion plays in HUD's position. After quoting the statute's one-strike language, the brief observes that "HUD has interpreted that provision to authorize *(but not to require)* PHAs to terminate the tenancy" of so-called innocent tenants. Brief for the Department of Housing and Urban Development (hereinafter "HUD Br.") at 14 (emphasis added). HUD follows up on the theme by devoting the second subsection of its statutory construction point to proving that "Section 1437d(l)(6) Does Not *Require* A Public Housing Authority To Seek Eviction For A Lease Violation, But *Instead Vests It With Discretion* Whether To Invoke The Lease Termination Clause." *Id.* at 20 (capitalization in original; emphasis added). The subsection observes, for example, that "HUD has consistently made clear that '[t]he fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it.' " *Id.* at 21 (*quoting* 66 Fed. Reg. 28,776, 28,782 (May 24, 2001)). HUD then proceeds to quote a regulation listing factors that might justify a PHA's decision not to evict an innocent tenant. *Id.* at 21-22 & n.7.

OHA, for its part, devotes an entire section of its brief to the proposition that "Eviction Is Not Mandatory But Discretionary," emphasizing, for example, that "[i]t is critical to note that the eviction provision at issue here is not mandatory. Indeed, PHAs are authorized to use discretion and encouraged to use their humane judgment when looking at each case and deciding each on its independent merits." Brief for the Oakland Housing Authority (hereinafter "OHA Br.") at 45 (capitalization in original).

Why is this resort to discretion so "critical" to both petitioners? There are several related reasons. To start with, the veil of discretion makes the one-strike provision seem less draconian. Don't worry, petitioners essentially assure this Court, truly innocent tenants do not really get evicted, because PHAs exercise their discretion to do justice.

That device, in turn, gives petitioners more traction in rebutting the argument that their interpretation of the one-strike provision yields absurd results that Congress could not possibly have contemplated. "The fact that the court could speculate about potentially harsh results in some isolated instances in which a PHA could invoke the lease clause in no way suggests that Section 1437d(l)(6) would lead to such 'absurd results'. . . ." HUD Br. at 45 (citation omitted). So, petitioners essentially paint both the Ninth Circuit and the public housing tenants who brought this case as alarmists who have let their imaginations run wild to conjure up a parade of horribles that would never materialize in real life. As HUD observes, these horribles include "eviction of tenants who in fact could not keep their household member from committing drug offenses [or] whose household member committed drug offenses at a place far removed from the public housing project." *Id.* at 44. These "results about which the court of appeals was concerned," HUD assures us, "are unlikely to occur," for

> [a] PHA would have little incentive, given its statutory mission, to evict a tenant who it believed is truly not culpable — at least if it would be harsh to do so — unless it concluded in the end that that course was justified by the other benefits that Section 1437d(l)(6) was intended to produce for the security of the housing complex and its tenants generally.

Id. at 45.

Petitioners employ the same device to try to blunt the complaints of each of the named public housing tenants in this case. As sympathetic as the plaintiffs in this case are, both petitioners are quick to point out that OHA "voluntarily ceased its effort to evict tenant Rucker, presumably based on a consideration of the factors enumerated by HUD." HUD Br. at 22; *see also* OHA Br. at 45. Putting aside for the moment the absence of any reason to believe OHA's decision not to put Pearlie Rucker out on the street was motivated by anything other than smart litigation tactics, petitioners' arguments boil down to this: Behold, the system works. Mrs. Rucker is a success story about a PHA's merciful exercise of discretion.

B. PHAs Exercise Their Discretion Against Leniency for Innocent Tenants.

Petitioners' heavy reliance on the discretion argument in its various permutations — and the incentive structures under which PHAs make these discretionary judgments — cry out for closer examination. Perhaps, as petitioners suggest, the Ninth Circuit is a modern-day Chicken Little sounding alarms where none are warranted. Maybe the horribles it described are "unlikely to occur," and the Ruckers of the world do not get evicted. If so, it should be hard to find examples of actual horror stories. But as organizations immersed in the field, *amici* can attest that "absurd results" do occur, and truly innocent tenants like Mrs. Rucker face eviction under HUD's interpretation of the statute. If PHAs are "encouraged to use their humane judgment" and to decide each case "on its independent merits," that humanity and proportionate justice is often difficult to discern in their decisions.

To assert broadly that many innocent tenants garner no benefit from PHAs' supposed sense of justice barely begins to

capture the level of injustice that is meted out in the name of HUD's one-strike policy. To demonstrate the pervasiveness and the wide variety of absurd results and to give this Court more of a sense of just how harsh the one-strike rule turns out to be in practice, we present a sampling of representative cases. Each involves a law-abiding tenant struggling against great odds to provide for his or her family. Each fact pattern is unique, but they fall into four main themes: (1) the family evicted for minor infractions unexpectedly committed by someone beyond their control; (2) the family evicted for the misconduct of an adult family member despite extraordinary efforts to ensure that the actor stayed away the moment he began to stray; (3) the victim of violence evicted because of the crime committed against her in her own home; and (4) the family evicted for the uncharacteristic act of a child with an otherwise unblemished record.

1. **The family evicted for the minor infraction unexpectedly committed by a non-family member beyond its control.**

Perhaps the most egregious one-strike horror stories are those in which a tenant who has a fleeting connection to the alleged perpetrator of a crime is put at risk because of conduct that only the most paranoid or clairvoyant tenant could possibly have foreseen.

Nena Allen, Marietta, Georgia. Nena Allen is such a case. Ms. Allen is a 20-year-old single mother of two young children, Trequan, 3, and Marquez, 1.[2] They live in the Johnny Walker Homes public housing complex in Marietta, Georgia, which is run by the Marietta Housing Authority ("MHA"). Ms. Allen moved to public housing in August 2000 in the hope of providing some stability for her children. Ms. Allen has been working at a

[2] The facts set forth below are drawn from the Findings of Fact and Conclusions of Law, *Housing Auth. for the City of Marietta v. Allen*, Case No. 01-E-2070 (Magis. Ct. Cobb County Ga. Nov. 14, 2001), and from information provided by Legal Aid of Cobb County, counsel for Ms. Allen.

Blockbuster video store since moving into public housing and currently earns $800 a month. She and her children also receive approximately $190 a month in food stamps.

In April 2001, the MHA notified Johnny Walker residents that the complex was being condemned and that they would have to move by year-end. Residents were offered a choice between transferring to other public housing in the area or receiving a Section 8 housing choice voucher. The Section 8 program is a federally subsidized housing program under which low-income families enter into leases for privately owned rental units, and local housing authorities, like the MHA, subsidize the rent. *See* 42 U.S.C. § 1437f. Ms. Allen opted for the Section 8 voucher because she believed it would allow her to find a safer, more suitable environment for her children. She received the voucher in September and by the end of the month had located a rental and paid a $250 deposit to hold it until the MHA's Section 8 program could inspect it. She and her family were well on the way toward the stability she craved.

But that stability was illusory. The next month, Ms. Allen was shocked to receive a three-day notice to vacate her apartment, advising her that "[o]n July 25, 2001," more than three months earlier, "Marietta Police Officers found a Marijuana seed inside your apartment." To make matters worse, a week later the MHA rejected her Section 8 application "based upon the termination of your assistance under the Public Housing Program for drug possession."

Ms. Allen knew nothing about a police visit to her apartment and the marijuana seed was a mystery. She was sure that there had been some mistake. It was only after talking to MHA staff and reconstructing her own activities on July 25 that she figured out what had happened. She was the victim of an unscrupulous acquaintance who evidently had used her apartment — exactly once — for an illicit purpose.

The scenario that led to such disastrous consequences is familiar to any working mother. Ms. Allen was dropping off her children at daycare that morning, when she realized she had

left their diaper bag at home. Ms. Allen had been transferred to a new Blockbuster store barely a month earlier and was afraid that she would be late for work if she returned home for the diaper bag. Instead, she left her apartment key at the daycare center and, after she arrived at work, telephoned a friend to ask her to pick up the key and retrieve the bag. The friend was not home when Ms. Allen called, but a mutual acquaintance, Angel Harris, answered the telephone and agreed to help Ms. Allen by picking up the key, retrieving the diaper bag, and returning both to the daycare center. Ms. Harris delivered the diaper bag to the daycare center at about 11:00 a.m.

Contrary to Ms. Allen's instructions, Ms. Harris did not return the key to the daycare center when she returned the diaper bag, a fact Ms. Allen discovered when she returned to pick up her children. But Ms. Allen thought nothing of it, because she found the key under her doormat when she returned home.

What Ms. Allen did not know, and did not learn until three months later when she received the eviction notice, was that Ms. Harris allegedly had been up to some mischief that day. Ms. Harris violated Ms. Allen's instructions and returned to the apartment after dropping off the diaper bag at the daycare center. According to an unsigned police report, a police officer, who was also employed as an MHA security guard, had stopped to "check a subject" sitting outside Ms. Allen's building. The subject, who turned out to be Ms. Harris, was talking to "her boyfriend." Ms. Harris walked around the building when the officer first approached. The officer asked the boyfriend where Ms. Harris lived, and the boyfriend pointed to Ms. Allen's apartment. According to the officer's report, he approached the apartment and "could smell a strong odor of marijuana inside." The apartment's screen door was shut, but not locked, and the main door was open. He decided to enter the apartment and found Ms. Harris. He searched the apartment and, as he reported, "I was unable to find the marijuana cigarette, [but] I did find a marijuana seed which was placed into evidence."

Ms. Harris did not mention the incident to Ms. Allen. Nor did the officer or the MHA, which evidently kept a copy of the police report in Ms. Allen's file. Although Ms. Allen did not know Ms. Harris especially well, she had known her and her family for some time and there was nothing in her past behavior that would have led her to suspect that she might do anything at all untoward in Ms. Allen's apartment.

The MHA pursued Ms. Allen with a vengeance, filing an immediate eviction proceeding in court. Citing the one-strike provision, the court upheld Ms. Allen's eviction for "drug-related criminal activity in her apartment." Findings of Fact and Conclusions of Law, *Housing Auth. for the City of Marietta v. Allen*, Case No. 01-E-2070, at 3 (Magis. Ct. Cobb County Ga. Nov. 14, 2001). Ms. Allen's appeal is pending.

Technically, Ms. Allen is entitled to remain in her apartment while her appeal is pending, but, with the complex about to be condemned and all the other residents being relocated, that technical right offers her no consolation. In the meantime, MHA has informed Ms. Allen that the Section 8 program's "denial of assistance under the Housing Choice Program stands," regardless of any pending appeals.[3]

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[3] Christina Mabanag is another public housing tenant against whom a PHA brought eviction procedures because of the unforeseeable actions of her guest. Ms. Mabanag, who lived with her three children in a one-bedroom apartment in a public housing project in San Francisco and who worked two jobs, was evicted by the San Francisco Housing Authority after a family friend staying for the weekend was arrested for drug possession. Ms. Mabanag was not home, said she did not know her friend used drugs, had no criminal record, and had never had problems at the project. Ms. Mabanag was able to save her home only by winning a jury verdict after San Francisco's Volunteer Legal Services Program took her case for free and challenged the eviction in court. Emily Cruz Lat, *If A Guest Uses Drugs, Out You Go*, The San Francisco Examiner, Aug. 24, 1998, at A-8; *see also Syracuse Hous. Auth. v. Boule*, 265 A.D.2d 832, 701 N.Y.2d 541 (4th Dept. 1999) (eviction of tenant upheld even though she was not aware of drug-related activity engaged in by her child's father, called in as an emergency babysitter).

2. The family evicted for the misconduct of an adult family member despite extraordinary efforts to banish him at the first sign of criminal conduct.

Sometimes the illegal activity for which a PHA chooses to evict a tenant is not that of a mere acquaintance, but of an adult family member who does not live in the apartment. If a family member engages in illegal activity in the apartment, or if the family is aware of his crimes, it might be just to evict the whole family. It might even serve the ends of justice to evict the unwitting family if it did not exercise enough diligence in ferreting out the criminal behavior or in setting stringent ground rules. But an eviction is manifestly unjust when the head of the household has set the ground rules, no one else in the family had a clue that one of the family members was involved in illegal conduct, and the head of the household has taken extraordinary steps to banish the perpetrator once his improper conduct was suspected.

That's what Terri Wells, Mildred Heard, and Flora O'Day thought. But the PHAs saw it differently.

Terri Wells, Ann Arbor, Michigan. Terri Wells' family was evicted from public housing, even though she had no knowledge of the activities that led to her eviction and had thrown her brother — who had been living with her temporarily — out of her apartment the moment she suspected that he might be involved in criminal activity.

Ms. Wells was the working mother of four young children: Christina, 13; Lakisha, 7; Lanisha, 6; and David, 4.[4] The family lived in a public housing unit she had rented from the Ann Arbor Housing Commission ("AAHC") since 1991. By 1996, Ms. Wells had worked her way off welfare and was earning $235 a

[4] The facts set forth below are drawn from *Ann Arbor Hous. Comm'n v. Wells*, 240 Mich. App. 610, 618 N.W.2d 43 (Ct. App. 2000), *appeal denied*, 463 Mich. 993, 625 N.W.2d 782 (2001), and information from the record provided by the Michigan Clinical Law Program, counsel for Ms. Wells.

week at a local Boston Market. Ms. Wells began her employment with Boston Market when it opened in late 1995, and by February 1996 had been promoted to supervisor. Ms. Wells loved her job and felt great about her ability to support herself and her children. But with her promotion came additional responsibility and increased hours. Ms. Wells arrived at work between 2:00 and 3:00 p.m. and stayed there to clean up until well after the restaurant closed at 9:00 or 10:00 p.m. Child care was a constant problem. Ms. Wells could not afford day care and, although a neighbor was sometimes able to watch her children, that arrangement was less than perfect since her neighbor had numerous children of her own.

In the spring of 1996, Ms. Wells learned that her brother, Carl White, was living in a homeless shelter. Ms. Wells saw a potential solution to her childcare problems. She would give her brother temporary lodging until he found a home of his own, and he, in return, would care for her children when she was at work. Carl agreed to the arrangement, and Ms. Wells set down clear rules: No visitors, and no drugs. Period.

Unbeknownst to Ms. Wells, her brother broke the rules. Neither Ms. Wells nor her neighbors noticed anything suspicious. There were no drug paraphernalia or drugs in her apartment, and her brother did not appear to have extra money. She had no reason at all to suspect that, in April 1996, Carl would make two drug sales to undercover police. Neither transaction was in Ms. Wells' apartment, and, of course, she did not witness them. Ms. Wells knew nothing of her brother's activities and, throughout April and May 1996, neither the police nor the AAHC told Ms. Wells about her brother's illegal conduct.

Then, in June, a friend of Carl's made a drug sale to undercover police on the grounds of the public housing project in which Ms. Wells and her children lived. Ms. Wells had never heard of this friend. That night the police raided Ms. Wells' apartment, evidently believing that Carl was in some way involved. Ms. Wells had just returned from her daughter Christina's junior high graduation, and her younger daughters

Lakisha and Lanisha were in the bathtub. The police found no evidence suggesting that drug-related activity was taking place in Ms. Wells' apartment; they found no cocaine, no guns, no money, no diluting materials, no scales, no pagers.

Carl White was not present when the raid occurred, and the police told Ms. Wells they were looking for *Cedric* White. Cedric was Ms. Wells' oldest son who was in prison, and had been for the previous two years. Although the police made no reference to Carl, Ms. Wells, in an abundance of caution, immediately ordered him out, and he left soon thereafter.

The police returned to Ms. Wells' apartment a month later and told her they were looking for Carl. The police did not tell Ms. Wells that Carl was wanted for selling drugs, but the next time Ms. Wells saw Carl, she told him that the police wanted to talk to him and urged him to call the police. Carl turned himself in to the police shortly thereafter, and was later sentenced to prison for selling cocaine.

In November 1996, five months after the police raided her apartment, Ms. Wells received a 30-day termination notice. When she did not leave, the AAHC filed an eviction proceeding against her in court under the one-strike provision. The case was tried to a jury in April 1997. The AAHC presented no evidence that Ms. Wells knew about the criminal activity or that she failed to take reasonable steps to stop it the moment she learned that Carl might be involved with drugs. The court denied Ms. Wells' request to instruct the jury that the AAHC had to prove that she knew or should have known of the illegal activity, or at least that she failed to take reasonable steps to stop it. During deliberations, the jury repeatedly asked questions of the court indicating that it was confused about the legal standard it must apply. But all the court did was reread the one-strike provision.

The jury deliberated for over thirteen hours before returning a verdict in favor of the AAHC, and Ms. Wells' appeal — which challenged the absence of an innocent tenant defense — was unsuccessful. *See Ann Arbor Hous. Comm'n v. Wells*, 240 Mich.

App. 610, 612, 618 N.W.2d 43, 45 (Ct. App. 2000), *appeal denied*, 463 Mich. 993, 625 N.W.2d 782 (2001).

Ms. Wells and her children stayed in her apartment until she exhausted all of her appeals. During that time no other trouble emanated from Ms. Wells or her apartment. The family is now out of public housing because of the offsite conduct of a brother, even though Ms. Wells had no reason to suspect his criminal activity; at the first whiff of untoward behavior, she evicted him; and, thanks to Ms. Wells, he turned himself in and no longer presents any threat to anyone.

Mildred Heard, Atlanta, Georgia. Mildred Heard faces the same prospect under similar circumstances, but in her case the perpetrator did not even live with her. Ms. Heard has been a tenant in public housing managed by the Atlanta Housing Authority ("AHA") for nearly 40 years.[5] For the past fourteen years she has lived in an apartment in Grady Homes Apartments. Ms. Heard lives with two of her children, Quantae, 20, and Tameshia, 22, and with Tameshia's 2-year-old son Da-Montez. Ms. Heard's adult son, Demond Heard, does not live with them, but Ms. Heard cares for Demond's children and several other grandchildren during the day in her apartment.

Ms. Heard appreciates the importance of safety as much as any tenant. In 1993, one of Ms. Heard's daughters, an innocent bystander in a drive-by shooting, was shot and killed at Grady Homes Apartments. Since then, Ms. Heard has suffered extreme depression, post-traumatic stress disorder, and a variety of other psychological problems for which she is taking medication and undergoing counseling with the Grady Community Health System. Ms. Heard, unable to work because of her disabilities, has recently applied for social security disability benefits.

Ms. Heard had always warned all of her children explicitly that she had a zero tolerance for any contact with drugs

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[5] The facts set forth below are drawn from publicly filed pleadings in *Heard v. Atlanta Hous. Auth. et al.*, Civ. Act. 1:01-CV-2029-JTC (N.D. Ga. filed Jul. 18, 2001).

anywhere, and particularly in her apartment. In November 1999, while her son Demond was visiting, Ms. Heard noticed a change in his behavior. Without any particular evidence, she suspected possible drug use. When Ms. Heard confronted Demond with her suspicions, he categorically denied that he was using drugs. Ms. Heard warned her son that she would not tolerate drug use by him or anyone who visited her home and told him not to even visit her if he had any contact with drugs. Despite Demond's assurances, Ms. Heard decided to take extra precautions. Ms. Heard told her son he was not welcome in her apartment, and ordered him to stay away except to drop off and pick up his children. Even then, Ms. Heard urged Demond to have his girlfriend shuttle the children back and forth whenever possible. Ms. Heard also warned Demond that if she ever had reason to believe that he was involved with illegal drugs, she would banish him from the apartment entirely.

For over a year, Ms. Heard kept close watch, but in Demond's limited visits, she saw no reason to take the more drastic step she had threatened. Then, on February 23, 2001, without Ms. Heard's permission or invitation, Demond barged into her apartment through the unlocked front door, slammed the door behind him, and tried to block it. Seconds later, the Atlanta police were at the door. They had been chasing Demond from the street, and arrested him for possession of crack.

Ms. Heard's daughter Tameshia was standing outside the apartment when the police rushed to the door. She too tried to enter the apartment, but the police handcuffed her to a fence and arrested her for obstruction, charges that a court ultimately dismissed.

Two months later, the AHA notified Ms. Heard that it was terminating her lease, effective the following week, because of the arrests of Tameshia and Demond. In an appeal of the decision, Ms. Heard promised to keep Demond away from her apartment. She even obtained a criminal trespass warrant, a court order keeping Demond off all AHA property.

Ms. Heard's appeals fell on deaf ears. In June 2001, the AHA confirmed the lease termination, specifically stating that it was the AHA's policy to enforce HUD's one-strike policy vigorously. Ms. Heard tendered her rent in June and July, but an AHA employee rebuffed her each time on the ground that her lease had been terminated. In July, the AHA filed an eviction proceeding against Ms. Heard in court. Ms. Heard filed a federal lawsuit seeking to enjoin the AHA from evicting her. The parties are negotiating to put the federal court proceedings on hold pending the outcome of this case.

Apart from emphasizing its lack of tolerance for crime, the AHA has never explained how it is increasing safety by evicting an entire law-abiding family for the offsite criminal conduct of a non-tenant son who barged into the apartment without invitation — and in violation of a directive to stay away — and who is now permanently barred from the home.

Flora O'Day, Ypsilanti, Michigan. Flora O'Day would have been another victim of HUD's one-strike policies, were it not for a procedural mistake by the Ypsilanti Housing Commission ("YHC") which was trying to evict her. What distinguishes Ms. O'Day's story from Ms. Wells' and Ms. Heard's is that the daughter whose conduct triggered the eviction proceeding committed her crime nowhere near the O'Day residence, and indeed she had virtually no relationship to Ms. O'Day.

Ms. O'Day is a mentally disabled grandmother whose sole source of income is social security disability.[6] Ms. O'Day suffered a severe head injury in an accident. As a result, her sense of time is muddled. Ms. O'Day cannot read. She cannot handle her own money, and relies on her sister to pay her rent and other bills. Ms. O'Day and her 12-year-old grandson Michael live in a two-bedroom unit in a public housing complex in Ypsilanti, Michigan. Ms. O'Day cares for three other

[6] The facts set forth below are drawn from *Ypsilanti Hous. Comm'n v. O'Day*, 240 Mich. App. 621, 618 N.W.2d 18 (Ct. App. 2000), and from information from the record provided by the Michigan Clinical Law Program, counsel for Ms. O'Day.

grandchildren while their parents work. Her adult son, Paul Wilson, comes by between 10:30 and 11:00 every evening to check in on her.

Ms. O'Day knew that one of her adult children — her 28-year-old daughter, Marcia — had drug problems. A court took away Marcia's children in 1990, and they had lived with Ms. O'Day for a while. By 1995, Marcia's children were living with their father. Marcia had been in prison, but as soon as she got out she was back on the street.

Marcia did not live with Ms. O'Day and rarely visited except to beg for money or steal from her. Ms. O'Day did not know Marcia's whereabouts at any given moment, and heard news of her only from her other children. Ms. O'Day acknowledged an obligation to keep her home crime-free. No one ever suggested that Ms. O'Day — or Marcia, for that matter — did anything to endanger anyone else in the housing complex.

In June 1998, Marcia was arrested for the sale of two rocks of crack cocaine for $20 to an undercover police officer. The sale did not take place in Ms. O'Day's apartment or even in the public housing complex where she lived. It occurred on property that was not owned by the YHC, three-quarters of a mile away from Ms. O'Day's home. At the time, Ms. O'Day did not know that her daughter was selling crack.

The next month, the YHC served Ms. O'Day with an eviction notice under the one-strike provision. The YHC insisted on punishing Ms. O'Day for Marcia's conduct even though Marcia did not live with her, barely visited, and had not engaged in any criminal activity on public housing property, much less in Ms. O'Day's apartment. The YHC had grounds to pursue Ms. O'Day's eviction under HUD's one-strike policies because Ms. O'Day had never bothered to take Marcia's name off the lease. To be sure, Ms. O'Day recertified and signed the lease annually. But Ms. O'Day could not read the lease, and Marcia never signed it.

Nevertheless, the YHC insisted on rushing to court to evict Ms. O'Day immediately, before the expiration of the 30 days it

was legally required to wait. The case was tried to a jury. The jury specifically found that Marcia was not under Ms. O'Day's control, but it also found that Marcia had been a guest, and (presumably, because she was on the lease) that she had been a resident and a member of the household. Based on those findings, the district court granted judgment for the YHC.

In the end, Ms. O'Day kept her apartment. But it was not because of the YHC's humanity or sense of justice. It was because, in its rush to get Ms. O'Day out of the apartment, the YHC committed a procedural error, rushing to a summary eviction proceeding without the statutorily required 30-days' notice.[7]

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[7] There are numerous cases in which innocent tenants are evicted because of drug charges against relatives or visitors to their homes. The Winter Park Housing Authority sought to evict Mary Dowdell, a 69-year-old diabetic with chronic renal failure because her 25-year-old son pleaded guilty to possession of three grams of marijuana. Ms. Dowdell challenged the eviction in a lawsuit. Sherri M. Owens, *Under a Federal Policy For Public Housing, A Winter Park Woman May Lose Her Home Because of Her Son's Shenanigans*, The Orlando Sentinel, Jul. 21, 1999, at D1; *see also* Marilyn McCraven, *In Public Housing, One Strike And You're Out On Street*, Baltimore Sun, Nov. 18, 1996, at 1B (Housing Authority of Baltimore City was trying to evict 67-year-old Lillie Scott, apparently a model public housing tenant, because her 27-year-old granddaughter was arrested for possession of cocaine a few blocks from Ms. Scott's apartment and told police she lived with her grandmother); Michael Casey, *Paterson Using Drug Law to Evict Tenants, Some Say Unfairly*, Bergen Record, Jan. 25, 2001, at S1 (Monica Rogers, 21-year tenant in Alexander Hamilton Housing Development in Paterson, evicted because her son was charged with drug possession).

Even *past* drug activity of visitors can trigger eviction of a law-abiding tenant. For example, the Osceola Public Housing project in Arkansas threatened to evict hospital worker Kimberly Scott if her long-time boyfriend came to the apartment to babysit their two-year-old child because the boyfriend had spent six months in a Missouri boot camp years earlier on a drug charge, and because of a couple of complaints from neighbors that he caused a disturbance. Andrew A. Green, *Get-Tough Public Housing Rule Stirs Gripes*, Arkansas Democrat Gazette, Aug. 31, 1998, at A1.

3. The victim of violence evicted because of the crime committed against her in her own home.

Read literally, the one-strike policy authorizes a PHA to evict a tenant if a visitor, say her boyfriend, commits the crime of beating her in her own home. After all, the abuser is a "guest" who has engaged in "criminal activity that threatens the health, safety, or right to peaceful enjoyment by" a tenant — the victim. One would think that a PHA would never resort to such a tortured reading of the statute to punish the victim of domestic violence — at least not a PHA that feels duty bound to exercise its discretion in a way that yields humane and just results.

But as Sandra May has learned, PHAs sometimes exercise their discretion to evict innocent victims of domestic violence.

Sandra May, Chicago, Illinois. The Chicago Housing Authority ("CHA") did everything it could to cast Sandra May and her three children into the street because her boyfriend brutalized her and damaged her home.[8] A single mother, Ms. May and her children live in a CHA townhouse. One evening, Ms. May's boyfriend stormed into her home, accused her of lying, and beat her with a broomstick until it broke in half. He also punched holes in her walls, tore down closet doors, and ripped shelves out of the linen closet. The rampage stopped only when the police arrived in response to a neighbor's call, and rushed Ms. May to the hospital. When Ms. May returned home from the hospital, the CHA presented her with an eviction notice and a warning to fix the damage.

[8] The facts set forth below were provided by the Legal Assistance Foundation of Metropolitan Chicago, which represented Ms. May in the eviction proceedings. Sandra May is a pseudonym. Ms. May's real name has been withheld to protect her privacy. Upon request of the Court or counsel for petitioners, *amici* will furnish contact information for her lawyer. These events took place in 1993, before President Clinton announced the "one-strike and you're out" initiative to enforce 42 U.S.C. § 1437d(l)(6) more vigorously, but this story demonstrates that PHAs had been producing harsh results even before the government embarked on its strict enforcement mission.

Ms. May, for her part, did everything she could to ensure that her abuser would never return to the housing unit for a repeat performance. She did not just break up with her ex, she secured a court order of protection prohibiting him from coming within 100 yards of her. Notwithstanding its discretion, the CHA proceeded with its eviction. Not content to await the formal proceeding, the CHA took the extra step of locking Ms. May and her children out of their home.

Ms. May ultimately was not evicted, but not because of any discretion exercised by the CHA. Rather, in an ironic twist, CHA's inhumanity is what saved her and her family from homelessness. It turns out that lock-outs are strictly prohibited under Illinois law, and the violator is subject to stiff penalties. So Ms. May countersued, exposing the CHA to enough downside liability that it acceded to a settlement dismissing the eviction proceeding, forgiving Ms. May the cost of repairing her unit, and paying her $1,000. Justice was served, but the CHA's discretion had nothing to do with it.[9]

4. The family punished for a child's uncharacteristic and unforeseeable act.

While some innocent tenants are victims of crimes, others are victims of unforeseen circumstances beyond their control. One need not be a tenant of public housing to be familiar with the scenario. Parents and grandparents who have worked hard to instill the right values in their children and grandchildren and have been vigilant for any signs that they might have gone astray are sometimes caught by surprise. Despite all their

[9] For another example in which a PHA chose to evict a tenant under the one-strike policy where the only underlying criminal conduct was violence *against* the tenant or her guest, see Edward C. Fennel, *Family Ordered Out Of Home After Shooting Death*, Post and Courier, Sept. 27, 1997, at B1 (North Charleston, South Carolina Housing Authority ordered Rose Marie Grandison to vacate her apartment because her boyfriend was murdered there, even though Ms. Grandison neither caused nor took part in the murder).

precautions, one day the child does something that runs counter to everything she has been taught.

Any parent who has faced this circumstance feels some sense of responsibility. And at times, the child's irresponsible act imposes burdens on the rest of the family. But it seems unduly harsh, and inconsistent with any sense of justice, to put the entire family out of its home — at least when the child presents no further risk of danger.

PHAs do not always see it that way. When it came to judging Karen Jones, Dorothy Springer, and Beulah Wilkins, the PHAs had no trouble visiting their children's isolated sins on their parents, and on the rest of the family.

Karen Jones, New York, New York. Karen Jones was a young woman in 1957 when she moved into her current apartment in Douglas Houses.[10] The housing complex run by the New York City Housing Authority ("NYCHA") had just opened, and she was the first tenant in her apartment. Today, Ms. Jones, a 68-year-old widow, is facing eviction from the place she has called home for the past 44 years. The eviction stems from an incident involving Ms. Jones' grandson, an honors student who now attends college more than 400 miles away from home.

Before retiring in 1999, Ms. Jones worked as a secretary for 13 years at Harlem Hospital, and before that as a customer service operator at Simon & Schuster. Ms. Jones now lives on social security and a pension from Harlem Hospital. She has been an active member of the Southern Baptist Church for more than 40 years. She is a diabetic, and suffers from both high blood pressure and hearing difficulties.

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[10] The facts set forth below were provided by the Neighborhood Defender Service of Harlem, which represented Ms. Jones in the eviction proceedings. Karen Jones and Michael Jones are pseudonyms. Their real names have been withheld to protect their privacy. Upon request of the Court or counsel for petitioners, *amici* will furnish contact information for Ms. Jones' lawyer.

Although he was not listed on the lease, Michael Jones, Ms. Jones' grandson, was raised in large part by his grandmother in Douglas Houses and spent significant time with her there. Michael, who is now 19, excelled academically under his grandmother's attentive watch. She paid most of his tuition at a private catholic school. While in high school, Michael worked at the Children's Aid Society and held a summer position at Chase Manhattan Bank as a clerk. After graduation, Michael enrolled at Norfolk State University in Virginia, where he has a partial scholarship from the Children's Aid Society and some university financial aid. Beyond that, Ms. Jones pays Michael's college tuition.

In January 2000, Michael was charged with armed robbery of a delivery man in Douglas Houses. Because Michael was a minor when the alleged incident occurred, he was treated as a youthful offender, and he was not — nor has he ever been — convicted of a crime. Now in his third semester at Norfolk State University, Michael works part-time at a Sears Roebuck & Co. near campus.

While Michael has moved on with his life, his grandmother cannot. As a result of Michael's arrest, NYCHA brought a one-strike eviction proceeding against Ms. Jones, a model tenant who spent years sacrificing for Michael and striving to instill in him values of hard work and decency. NYCHA alleges that Ms. Jones' continued presence at Douglas Houses "constitutes a danger to the health and safety of [her] neighbors." NYCHA has never explained how that could be with Michael 400 miles away and living a productive and law-abiding life.

Dorothy & Arthur Springer, Broward County, Florida. Dorothy and Arthur Springer got a double of dose of what Ms. Jones went through — with the isolated lapses of two separate children.[11] The difference is that in their case neither child's lapse occurred on public housing property. Nevertheless,

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[11] The facts set forth below are drawn from Roger Williams, *One Strike and You're Out on the Street*, New Times Broward-Palm Beach, June 15, 2000.

the Broward County Housing Authority ("BCHA") evicted Mr. and Mrs. Springer, along with their five children, under HUD's zero-tolerance policies.

Mr. Springer has a weak heart and had suffered a stroke in 1998. Mrs. Springer also suffers from health problems, including a birth defect that left her with only four fingers on one hand and a history of operations for chest tumors. Since neither parent is able to work, the family subsists on social security and disability payments. The family has no other source of income and cannot afford market rents.

The Springer family's one-strike nightmare began with isolated and unprecedented lapses by two of their teenage boys. Seventeen-year-old Jeremy Springer had never been in any trouble with the police when, in July 1999, a Broward Sheriff's deputy noticed him driving slowly down the road and stopped him because of this suspicious behavior. A search of the car yielded cocaine. Jeremy was arrested and sentenced to probation, and has not strayed again.

On the basis of Jeremy's arrest, the BCHA began proceedings directed at evicting the Springers. The BCHA refused to accept the rent checks the Springers tendered. Nevertheless, Mrs. Springer saved the back rent in an account, prepared to pay it at a moment's notice, and embarked on negotiations in the hopes of saving their home.

Those negotiations were put in jeopardy four months later, when Jeremy's 14-year-old brother Jermaine was caught, together with a few friends, vandalizing a portable classroom on the grounds of the school he used to attend. The police arrested Jermaine and the incident ultimately yielded a penalty of community service. Jermaine has not been in trouble with the law since.

A few days after the school incident, a Broward Sheriff's deputy came to the Springers' home to deliver an eviction notice. Upon hearing the news, Mr. Springer had a heart attack.

The Springers desperately tried to save their home. They proffered their back rent from the summer, which

Mrs. Springer continued to squirrel away in an account. They even considered ejecting their 14-year-old son from their home, but they could not bring themselves to do it. Their efforts failed and the BCHA evicted them, without ever explaining what more the Springers should have done to prevent their children from straying or how they presented any continuing threat to their neighbors.

Beulah Wilkins, New York, New York. Like the Springers, Beulah Wilkins faces a one-strike eviction because of the single lapse of a child nowhere near home. The lapse, though far more tragic, was no more foreseeable. If NYCHA gets its way, it will put Ms. Wilkins and her extended family of eleven on the street.

Ms. Wilkins, 47, has lived for the past 28 years in the same federally subsidized apartment in Amsterdam Houses, a public housing complex run by NYCHA.[12] She is asthmatic and anemic and has back problems. Ms. Wilkins currently lives in a three-bedroom apartment with two of her four biological children; six grandchildren and three adopted children — two of her cousin's biological children and one of her brother's biological children — all of whom she is raising and supporting. Until the events described below, she was also raising and supporting a fourth adopted child — her brother's daughter, Chavonda. Ms. Wilkins' adopted children began living with her in 1989. Ms. Wilkins communicated loud and clear that she had no tolerance for criminality within her household. When one of her sons was alleged to have committed a crime, Ms. Wilkins banished him from her apartment.

But no one, not even Ms. Wilkins, could have foreseen the conduct of Chavonda. Chavonda's biological mother and father are both crack addicts who abandoned Chavonda when she was only a few months old. Chavonda, who lived with Ms. Wilkins since she was a young child, is mentally retarded and has been assessed with an IQ of only 66. She has been in special education

[12] The facts set forth below were provided by the Neighborhood Defender Service of Harlem, which represents Ms. Wilkins in the eviction proceedings.

since the second grade and Ms. Wilkins has made sure that Chavonda has participated in a series of courses offering a comprehensive career life skills program.

Last year, when Chavonda was 17, she became pregnant, and gave birth to a baby in a privately owned building several miles from Amsterdam Houses. No one in her family knew she was pregnant. Immediately after giving birth, Chavonda threw her newborn baby out the window of the building, tragically killing the baby. Chavonda, who had never been in trouble with the law before, pled guilty to first degree manslaughter, and was sentenced to five years in prison.

Although Chavonda, now incarcerated, presents no threat to anyone at Amsterdam Houses or anywhere else, NYCHA has instigated a one-strike eviction proceeding to put the entire Wilkins family out on the street. NYCHA informed Ms. Wilkins that one of the reasons it decided to commence an eviction proceeding was that the incident had occurred two blocks from another property owned by NYCHA, although it was nearly five miles from Amsterdam Houses. But NYCHA has never explained what safety purpose is served by evicting a family of 12 from their home of 28 years when none of them knew anything about Chavonda's pregnancy, much less could have anticipated the horrifying act of this retarded child.

C. PHAs Exercise Their Discretion To Evict Even The Most Blameless Of Tenants Because HUD Has Erected A System Of Incentives To Evict.

No one with any sense of justice could conclude that all of these tenants and their families deserved to be evicted. And many more stories of this sort are unfolding across the country. If, as petitioners insist, PHAs have the discretion to let the families stay in the interest of justice — to yield humane results that reflect sober and individualized assessments of blame — one wonders how it is possible for PHAs to reach such unthinkable results. The answer undoubtedly can be traced to the formal and informal incentive structure HUD has adopted to encourage

one-strike evictions, coupled with the bureaucratic culture in which PHAs operate.

In their repeated references to discretion, petitioners try to portray PHAs as neutral arbiters eager to reach just results. They would have us believe that "[a] PHA would have little incentive, given its statutory mission, to evict a tenant who . . . is truly not culpable." HUD Br. at 45. But quite the opposite is true; PHAs are under pressure to churn out one-strike evictions without regard to the equities. From the moment President Clinton unveiled his vision of beefed up enforcement of the one-strike provision, the federal government has made no bones about its intention to thrust on PHAs an exceedingly harsh interpretation of the law. *See* President William J. Clinton, Address Before a Joint Session of Congress on the State of the Union (Jan. 23, 1996), in I Pub. Papers 1996, at 83; *see also* Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing, 32 Weekly Comp. Pres. Doc. 582, 584 (Apr. 1, 1996) ("If you break the law, you no longer have a home in public housing, one strike and you're out. That should be the law everywhere in America."). The President then publicly directed the Secretary of HUD to "issue guidelines to public housing and law enforcement officials to spell out with unmistakable clarity how to enforce" the one-strike policy. *Id.* Specifically, he declared that "many PHAs have not fully understood the scope of their legal authority," and derided those PHAs for whom "enforcement frankly has not been a priority." *Id.* The President specifically directed a mechanism of rewards and punishments to hold PHAs accountable to tally up more one-strike evictions: "Under the new rules HUD will propose, . . . there will actually be penalties for housing projects that do not fight crime and enforce 'one strike and you're out.' " *Id.* Conversely, PHAs that "live up to their responsibilities" to rack up one-strike evictions "will improve their chances for increased funding and for greater flexibility." *Id.*

The President demanded "unmistakable clarity" on that score, and that is what HUD delivered. HUD's first directive on the one-strike initiative escalated the rhetoric to "zero tolerance" and declared that "HUD will provide incentives for PHAs to aggressively implement One Strike policies, through . . . HUD's management evaluation system for housing authorities." HUD Initiative 96-16, *"One Strike and You're Out" Screening and Eviction Guidelines for PHAs* (April 12, 1996), *available at* http://www.hudclips.gov/offices/pih/publications/notices/96/pih96-16.pdf. "Under such a performance evaluation system," HUD continued, "a high-scoring, high-performing PHA would receive less federal oversight and may be eligible to receive additional formula funds . . . ; a PHA with a failing . . . score would be ineligible for such additional funding and could ultimately face a HUD takeover of its management." *Id.*

In keeping with this promise, HUD has developed a scoring system that rewards PHAs for pursuing one-strike evictions. HUD's formula for determining the amount of money to be allocated annually to PHAs for capital improvements rewards individual PHAs based on "[t]he extent to which the [PHA] . . . implements effective screening and eviction policies and other anticrime strategies." 42 U.S.C. § 1437d(j)(1)(I)(i).

HUD has developed a similar incentive structure in allocating operating funds to PHAs. Under that structure, one of the factors that HUD evaluates in allocating funds is the security provided by a PHA, which, in turn, is measured by, among other things, a PHA's adoption and implementation "of screening and resident eviction policies and procedures." 24 C.F.R. § 902.43(a)(5)(i); *see* HUD Real Estate Assessment Center, *Quick Reference Guide For PHAs*, Appendix B (Sept. 2001). HUD's instructions to PHAs emphasize the importance of lease enforcement criteria in securing funding and, again, HUD evaluates nothing in this category but the PHA's slavish adherence to the one-strike policy. *See* HUD Real Estate Assessment Center, *Instruction Guidebook for Completing Public Housing Assessment Systems Management Operations*

Certification Form HUD-50072 at 30-31 (Oct. 2001). HUD explicitly emphasizes that funding decisions will be based in part upon a PHA's ability to document that current eviction screening procedures result in the eviction of residents who meet the one-strike criteria and the total number of evictions as a result of the enforcement of one-strike criteria.[13] *See also* 24 C.F.R. § 902.67(a)(1) (a PHA with a particularly high score is also rewarded with greater autonomy and relief from certain onerous reporting requirements).

Under these funding formulas, every one-strike eviction increases a PHA's chances of securing funds, while a decision to excuse an innocent tenant garners no reward. Just as we would be skeptical of the quality of justice meted out by a court whose funding is linked to its judges' conviction rates, we can take scant consolation in the discretion of a PHA whose funding is linked to the sheer number of one-strike evictions it pursues.

In light of this incentive structure, it is not at all surprising that PHAs routinely enforce the one-strike provision against innocent tenants without much regard for the particular facts presented by each case. In this regard, PHAs are no different from other "street-level bureaucracies," which are often notoriously indifferent to the equities of the cases before them. Michael Lipsky, *Street-Level Bureaucracy* (1980); *see* Evelyn I. Brodkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, Soc. Serv. Rev., Mar. 1997, at 1, 5. Facing "inadequate resources, few controls, indeterminate objectives, and discouraging circumstances," bureaucracies like PHAs "develop routines and simplifications," Lipsky, *supra*, at 82-84 — in essence powerful default modes that dominate even when they might undermine the agency's broader objectives. In other words, a PHA that has elevated the one-strike precept to the axiomatic level will not

[13] HUD notes that "A PHA should not be penalized because none of its residents met the One-Strike criteria," but that does not change the fact that a PHA is affirmatively rewarded for evicting any tenant — innocent or guilty — under the one-strike rule.

be particularly receptive to requests for exceptional treatment. And as long as that is true, a PHA's discretion is no protection against absurdly unjust results.

CONCLUSION

As the narratives set forth above demonstrate in different ways, a PHA's latitude to abandon a one-strike eviction provides little protection from injustice. Victims of domestic violence, elderly grandparents, committed parents — all are vulnerable to the very kinds of absurd results that petitioners dismiss as "unlikely." Never mind that the tenant took proactive steps to prevent crime, or even that she took the heart-wrenching step of kicking out the offending household member. Never mind that the crime occurred offsite or that no parent could have foreseen the child's acting out. Never mind that the eviction would do nothing to enhance safety in the housing complex. None of that matters in the practical reality where HUD has developed incentives to encourage evictions under any circumstances and PHAs are, therefore, disposed to evict uncritically. The only rational interpretation of 42 U.S.C. § 1437d(l)(6) is one which includes an innocent tenant defense.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL., RESPONDENTS

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AARP, ENPHRONT, ISLAND TENANTS ON THE RISE, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, CARMELITOS TENANTS ASSOCIATION, & PUBLIC HOUSING RESIDENT COUNCIL, IN SUPPORT OF RESPONDENTS PEARLIE RUCKER, ET AL.

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In the Supreme Court of the United States

No. 00-1770

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER
v.
PEARLIE RUCKER, ET AL., RESPONDENTS

No. 00-1781

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS
v.
PEARLIE RUCKER, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AARP, ENPHRONT, ISLAND TENANTS ON THE RISE, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, CARMELITOS TENANTS ASSOCIATION, & PUBLIC HOUSING RESIDENT COUNCIL, IN SUPPORT OF RESPONDENTS PEARLIE RUCKER, ET AL.

INTERESTS OF THE AMICI CURIAE[1]

Amici Curiae include AARP and tenant organizations representing many thousands of public housing residents in most jurisdictions throughout the nation. Their members, and the communities in which they reside, are directly affected by the eviction policies at issue here.

Amicus AARP is a nonprofit membership organization of 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Over 1.7 million households, headed by a person 62 years of age and older, live in federally subsidized rental housing. AARP's interest in housing extends to the rights of those older residents, including those who are raising their grandchildren, some of whom reside in public housing covered by the eviction policies at issue in this case.

Additional Amici are tenant organizations representing public housing residents in communities around the nation. Each of these tenant organizations has an interest in ensuring that this Court maintain and enforce clear and long-standing congressional policies that protect innocent, law-abiding tenants from unjust evictions.

Amicus ENPHRONT—Everywhere and Now Public Housing Residents Organizing Nationally Together—is a resident-led organization with members and affiliates in 46 states, in addition to Puerto Rico and the District of Columbia, that advocates for the preservation, improvement and development of public housing through coordinated local and

---

[1] Amici Curiae have obtained the written consent of Petitioners United States Department of Housing and Urban Development (HUD), Oakland Housing Authority (OHA), and Harold Davis, as well as the written consent of Respondents Pearlie Rucker, et al. to file this brief with the Court.

Pursuant to Supreme Court Rule 37(6), Amici Curiae note that counsel for Amici wrote the entirety of this brief and that no person or entity, other than the Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

national action. The organization also works to educate residents about the laws and policies affecting their lives, including those governing evictions.

Amicus Massachusetts Union of Public Housing Tenants (Mass Union), a membership organization including individual residents and local tenant organizations, represents thousands of tenants statewide. It seeks to advance safe and secure public housing through responsible behavior by both tenants and housing authorities. Mass Union believes that while housing authorities should act vigilantly to protect families from crime and violence through eviction of tenants that do not live responsibly, residents should not have to fear that their entire families will become homeless as the result of one bad act which the head of household had no reason to anticipate, and innocent tenants should keep their homes if they take reasonable steps to exclude wrongdoers.

Amicus Island Tenants on the Rise is a Hawai'i statewide nonprofit organization of elected public housing tenants from five islands. Formed in 1996, it represents the interests of over 2000 families. It provides training and counseling to residents with respect to evictions and issues related to crime, security, and maintenance in their homes, and advocates for its members with respect to the policies of the state housing authority.

Amicus Public Housing Resident Council (PHRC) is the city-wide organization of all public housing tenant leaders in Kansas City, Missouri. Its membership consists of 55 elected officers of the various public housing developments, representing over 1,800 public housing families and households. Established in 1994, it is recognized by the Housing Authority of Kansas City (HAKC) as the Resident Advisory Board and as the city-wide organization of resident leaders. The PHRC negotiated a lease with the HAKC, which includes protection for innocent tenants, which, in conjunction with other crime and security measures, has proven effective in

reducing crime in HAKC public housing communities, while protecting tenants against arbitrary loss of their homes.

Amicus Carmelitos Tenants Association, in existence for more than 25 years and incorporated in 1994, is the recognized representative of the more than 500 residents of the Carmelitos housing development in Long Beach, California. It publishes a monthly newsletter to inform and educate its members, has negotiated and commented on revisions to leases, represents tenants in grievances, and counsels tenants on eviction-related issues.

SUMMARY OF ARGUMENT

Section 1437d(*l*)(6) of the United States Housing Act provides that Public Housing Authorities (PHAs) that receive federal assistance shall use leases that "provide that any . . . drug-related criminal activity on or off [public housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(6) (Supp. V 1999).

HUD has interpreted this section to require PHAs to use leases that contain provisions obligating a public housing tenant

> [t]o assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near [public housing] premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i)(B) (2000). In promulgating this regulation, HUD explained that it understood section 1437d(*l*)(6) as requiring that PHAs use leases imposing upon public housing tenants the obligation to warrant against illicit drug activity. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) ("The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.").

While Amici fully support Respondents' argument that Congress intended to create, as a matter of federal law, an innocent tenant[2] defense to eviction under the lease provision required by section 1437d(*l*)(6), Amici here argue in the alternative that the text of section 1437d(*l*)(6) is silent as to the existence of affirmative defenses and that HUD's interpretation of the section, precluding an innocent-tenant defense, is an unreasonable construction of the statute. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *id.* at 844 (noting that where a "legislative delegation to an agency on a particular question is implicit rather than explicit" the question for the court is whether the agency's interpretation is reasonable).[3]

---

[2] Throughout this brief, Amici will use the term "innocent tenant" to mean a public housing tenant who did not know, and had no reason to know, of the drug-related criminal activity that is the basis for a PHA's eviction action against the tenant.

[3] Petitioners OHA and Davis imply that HUD interpreted section 1437d(*l*)(6) pursuant to express congressional delegation and that, therefore, HUD's regulations should be given "'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" OHA Brief 26 (quoting *Chevron*, 467 U.S. at 843–44). OHA's implication is mistaken: Congress did not expressly delegate authority to HUD to promulgate legislative regulations to give effect to section 1437d(*l*)(6). *Cf.* 42 U.S.C. § 1437d(*q*)(5) (1994 & Supp. V 1999) ("The Secretary shall, by regulation, establish procedures necessary to ensure that information provided under this subsection to a public housing agency is used. . . as required under this subsection."). HUD's authority to interpret section 1437d(*l*)(6) arises under Congress' grant of general rule-making power, as HUD itself notes. *See* 24 C.F.R. pt. 966 (2000) (citing 42 U.S.C. § 3535(d) (1994)). Thus the inquiry for the Court is whether

Section 1437d(*l*)(6) indisputably requires PHAs to use leases that create a cause for termination of tenancy. But under basic principles of landlord-tenant law, the existence of a cause for termination is not incompatible with the existence of affirmative defenses to eviction. Federally assisted public housing is an amalgam of state and federal law, and the existence of federal protections against eviction do not preempt protections available under state law, as HUD has expressly acknowledged. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,565 (Oct. 11, 1991). The text of section 1437d(*l*)(6) is silent as to the existence of any affirmative defenses. Congress enacted section 1437d(*l*)(6) against a backdrop of landlord-tenant law under which affirmative defenses may be asserted in response to a cause for termination. Thus, the text's silence regarding affirmative defenses cannot be taken as an indication of congressional intent to preclude an innocent-tenant defense.

HUD's interpretation of Congress' silence is unreasonable.

1. HUD has previously tried to curtail tenants' rights to present legal and equitable defenses to eviction. When it did so, Congress interceded and asked HUD to reconsider. Petitioners argue that because there is no express language in section 1437d(*l*)(6) creating an innocent-tenant defense, the Court should conclude that Congress did not intend to permit one. In light of this history, however, the opposite presumption should hold. Absent clear statutory language that eliminates defenses, the Court should conclude that section 1437d(*l*)(6) leaves in place any affirmative defenses to eviction that exist under state or federal law.

2. Congress requires PHAs to use leases that do not contain any unreasonable terms or conditions. 42 U.S.C.

HUD's regulations implementing section 1437d(*l*)(6) are reasonable. *United States v. Mead Corp.*, 121 S.Ct. 2164, 2172 (2001); *Chevron*, 467 U.S. at 844.

§ 1437d(*l*)(2) (1994 & Supp. V 1999). HUD argues that this requirement has no bearing on the proper interpretation of section 1437d(*l*)(6) because, by enacting the section, Congress has decided that the exclusion of an innocent-tenant defense is reasonable. But this argument begs the question, for it assumes that the section precludes an innocent-tenant defense. The proper question is whether Congress' prohibition against unreasonable terms suggests anything about whether, in enacting section 1437d(*l*)(6), Congress intended to prohibit the innocent-tenant defense. If there are reasons for believing that the exclusion of such a defense would be unreasonable, then the prohibition against unreasonable terms suggests that section 1437d(*l*)(6) should not be interpreted as prohibiting the defense.

There are at least two reasons for believing that the exclusion of an innocent-tenant defense would be unreasonable. The first is that it undermines the central policy goal it purports to further. HUD argues that strict liability gives public housing tenants an incentive to determine whether their household members or guests are engaging in drug-related activity and to prevent such activity from occurring. However, the preclusion of an innocent tenant defense almost ensures that tenants will not seek the assistance of public housing authorities or the police to address the illicit behavior because such a request could easily result in the tenant's eviction.

Second, the preclusion of an innocent tenant defense is inconsistent with Congress' endorsement of the good cause eviction requirement in public housing. The good cause requirement was first recognized by the courts in the 1950s, was developed by HUD in the 1960s and 1970s, and was endorsed by Congress and made part of the Housing Act in 1983. Underlying the good cause requirement is the idea that, because of the importance of the benefit involved, a public housing tenant should not be deprived of his or her home in the absence of serious misconduct for which the ten-

ant can fairly be held responsible. Permitting the eviction of innocent tenants is inconsistent with this long-standing principle and so is unreasonable.

3. There is little extant legislative history that is relevant to the question of an innocent tenant defense. Most of the history on which Petitioners and their Amici Curiae rely does not speak to the issue of whether a tenant, faced with possible eviction for alleged breach of the lease provision mandated by section 1437d(*l*)(6), may assert any affirmative defenses. The one piece of legislative history that directly bears on the questions presented supports the conclusion that, in enacting section 1437d(*l*)(6), Congress not only did not intend to preclude affirmative defenses but intended to protect innocent tenants. The Senate committee report accompanying legislation amending section 1437d(*l*)(6) states that the section does not create good cause to evict innocent family members. The report also explicitly states that eviction courts are to exercise discretion in considering whether to evict under the required lease provision. This is weighty evidence that Congress believed that a tenant could present affirmative defenses, including innocence, to the eviction court. If the section precluded defenses, the only issue for the eviction court to decide would be the existence of a cause for termination, and the court would have no occasion to exercise its discretion.

4. When a statute is silent about some issue, deference to agency regulations is appropriate when the agency's regulations apply the statute's general policies to specific circumstances that Congress may not have considered. This is not a case in which Congress expected HUD to fill a statutory gap. A public housing tenancy is an amalgam of federal and state law. The distinction between causes for eviction and affirmative defenses is basic to state landlord-tenant law. Moreover, public housing tenants routinely assert state-law defenses in eviction proceedings. In enacting section 1437d(*l*)(6), Congress was well aware of the hybrid nature of the public housing leasehold interest and the use of state-law

defenses to eviction. Through section 1437d(*l*)(6), Congress required PHAs to use leases that create a specific cause for termination. The availability of affirmative defenses to eviction is a central element of the public housing tenancy. Had Congress intended to eliminate affirmative defenses, one would expect Congress to have done so explicitly. Congress' silence on the availability of affirmative defenses is an indication of its intent not to disrupt the satus quo.

ARGUMENT

THE TEXT OF SECTION 1437d(*l*)(6) IS SILENT AS TO THE EXISTENCE OF AN INNOCENT TENANT DEFENSE; HUD'S INTERPRETATION OF THE SECTION IS UNREASONABLE AND THEREFORE INVALID

I. THE TEXT OF SECTION 1437d(*l*)(6) IS SILENT AS TO THE EXISTENCE OF AN INNOCENT TENANT DEFENSE

Under Petitioners' interpretation of the plain language of section 1437d(*l*)(6), Congress requires PHAs to use leases that permit them to terminate the tenancy of a public housing tenant and evict the tenant if a member of the tenant's household, a guest, or other person under the tenant's control engages in specified drug-related activity, regardless of whether the tenant knew, or had reason to know, about the drug-related activity. *See, e.g.*, Brief for the United States Department of Housing and Urban Development (HUD Brief) 14, 18; Brief for Petitioners Oakland Housing Authority and Harold Davis (OHA Brief) 17–18, 28.

Petitioners primarily base their interpretation on two premises. The first is what HUD describes as the "expansive" language used in section 1437d(*l*)(6): The provision makes "any" drug-related criminal activity a ground for termination. HUD Brief 20; *see also id.* at 23; OHA Brief 27. The second is that the section contains no express language

limiting the required lease provision to drug-related activity of which the tenant was, or should have been, aware. HUD Brief 19; OHA Brief 29. From these premises, Petitioners conclude that Congress intended to permit PHAs to hold tenants strictly liable for the conduct of their household members, guests, and others over whom they have control. HUD Brief 20; OHA Brief 29.

As Amici will demonstrate, Petitioners' conclusion is simply a non sequitur. From the fact that the section unambiguously requires PHAs to use leases that create an unqualified cause for termination, it does not follow that the section prohibits affirmative defenses to the cause. The section is silent as to the existence of such defenses.

As HUD correctly notes, "'[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.'" HUD Brief 18 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). HUD concedes that section 1437d(*l*)(6) "does not expressly address the tenant's level of personal knowledge, in the sense that it does not expressly condition eviction on any state of personal knowledge." *Id.* at 23. HUD nonetheless concludes that the section's use of "any" and the absence of express defenses precludes an innocent-tenant defense.

HUD's argument ignores "the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. When basic elements of typical state landlord-tenant law are considered—elements upon which Congress has relied since it created federally-assisted public housing in 1937[4]—it becomes apparent that the fact that section 1437d(*l*)(6) provides a ground for termination does not preclude the existence of affirmative defenses to that ground.

[4] The 1937 act recognized state "civil and criminal jurisdiction in and over" federally owned public housing projects and explicitly preserved "the civil rights under the State or local law of the inhabitants on such property." United States Housing Act of 1937, Pub. L. No. 75-412, § 13(b), 50 Stat. 888, 895.

HUD has long recognized that a public housing tenancy is defined, in part, by state landlord-tenant law. *See, e.g.*, Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988) ("[T]he procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law."). In announcing its final rule concerning eviction for drug-related activity following the passage of the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990), HUD emphasized that a public housing tenancy should be understood as a creature of "normal landlord-tenant law." Public Housing Lease and Grievance Procedures, 56 Fed. Reg. at 51,567.

It is a basic principle of "normal landlord-tenant law" that the existence of a statutory or contractual cause for termination of a tenancy is not incompatible with the existence of affirmative defenses to termination on that ground. Thus, for example, in most if not all states, nonpayment of rent is a ground for eviction.[5] However, in most states, a tenant may raise the landlord's breach of the implied warranty of habitability as an affirmative defense to eviction for nonpayment of rent.[6] The defense is available notwithstanding the fact that

[5] *See, e.g.*, Cal. Civ. Proc. Code § 1161(2) (West 1982 & Supp. 2001); Or. Rev. Stat. § 105.115 (1999); Tex. Prop. Code Ann. ch. 24 (Vernon 2000).

[6] By 1979, the doctrine of implied warranty of habitability had obtained majority status in the United States, having been adopted by 41 states and the District of Columbia. *See Pugh v. Holmes*, 405 A.2d 897, 902 & n.2 (Pa. 1979) (collecting cases and statutes). Most courts to have considered the issue have held that breach of the implied warranty of habitability is an affirmative defense to eviction for nonpayment of rent. *See* Robert S. Schoshinski, American Law of Landlord and Tenant § 3:22 n.4 (1980 & Supp. 2001) (collecting cases); *see also* Restatement (Second) of Prop.: Landlord and Tenant § 5.1 n.7a (1977 & Supp. 2001) (collecting cases).

the statutes making nonpayment of rent a ground for eviction typically do not explicitly provide for affirmative defenses.[7] Similarly, many courts have refused to evict when they found that the tenants should not be held responsible for the offending conduct.[8] Moreover, many states have recognized an innocent-tenant defense to for-cause evictions.[9]

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[7] For a discussion of the common law development of the implied warranty of habitability, see Schoshinski, *supra* note 6, § 3:16. Some states have created the implied warranty by statute, *id.* § 3:31, and many have recognized assertion of the implied warranty as an affirmative defense to eviction, *id.* § 3:32 n.83.

[8] *See, e.g., Brown v. Hous. Opportunities Comm'n*, 714 A.2d 197 (Md. 1998) (upholding authority of trial court to refuse to evict tenant for demonstrated breach of lease involving off-premises fight and drug possession of household member); *Hodess v. Bonefont*, 519 N.E.2d 258 (Mass. 1988) (holding that thefts committed by sons not sufficient reason to evict tenant), *Investors Diversified Prop. Mgmt., Inc. v. Brown*, No. 87-360-II, 1988 WL 102781 (Tenn. Ct. App. Oct. 7, 1988) (holding that single, unforeseeable assault by child on playmate not sufficient for eviction of tenant); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341 (W.Va. 1988) (holding that beating of tenant by boyfriend was not sufficient reason to evict).

[9] *See, e.g.*, Conn. Gen. Stat. § 47a-15 (1991); Mass. Gen. Laws ch. 121B, § 32 (Supp. 2001); *Hous. Auth. of Norwalk v. Harris*, 625 A.2d 816 (Conn. 1993); *Williams v. Hawai'i Hous. Auth.*, 690 P.2d 285 (Haw. Ct. App. 1984); *Am. Apt. Mgmt. Co. v. Phillips*, 653 N.E.2d 834 (Ill. App. Ct. 1995); *Boston Hous. Auth. v. Bell*, 697 N.E.2d 130 (Mass. 1998) (reaffirming *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982)); *Charlotte Hous. Auth. v. Patterson*, 464 S.E.2d 68 (N.C. Ct. App. 1995); *Hous. Auth. v. Thomas*, 723 A.2d 119 (N.J. Super. App. Div. 1999); *Allegheny County Hous. Auth. v. Hibbler*, 748 A.2d 786 (Pa. Commw. Ct. 2000); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504 (Tenn. 2001), *cert. denied*, 122 S.Ct. 59 (2001), *Wessington House Apts. v. Clinard*, No. M 1999-01029-COA-R3-CV, 2001 WL 605105 (Tenn. Ct. App. June 5, 2001); *cf.* 7 C.F.R. pt. 1930, subpt. C, Ex. B ¶ XIV(A)(2)(c) (2000) (Rural Housing Service (RHS) regulation providing that, for RHS-administered housing, drug-related grounds for eviction do not extend to uninvolved household members, or to cases in which tenant takes reasonable steps to prevent or control or remove the offender). For a discussion of various states' experiences with drug-eviction policies and the innocent-tenant defense see David B. Bryson & Roberta L. Youmans, *Crime, Drugs, and Subsidized Housing*, 24 Clearinghouse Rev. 435 (1990); Diana A. Johnston, *Drugs and Public Housing: A Connecticut Case Study*, 24 Clearinghouse Rev. 448 (1990).

It is indisputable that section 1437d(*l*)(6) requires PHAs to use leases that make the commission of certain criminal and drug-related activity a cause for termination of tenancy. But Petitioners are mistaken in arguing that the creation of a broad cause for termination and the absence of any express language creating an affirmative innocent-tenant defense demonstrates that Congress intended to impose a lease provision requiring the tenant to warrant that no drug-related activity will occur on or off public housing premises, regardless of the tenant's knowledge. *See* HUD Brief 23; OHA Brief 29. While section 1437d(*l*)(6) requires PHAs to use leases that contain a certain cause for termination of tenancy, the statute is silent as to the existence of any affirmative defenses to that cause.[10]

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[10] HUD argues that Congress' subsequent passage of the Quality Housing and Work Responsibility Act of 1998 (Quality Housing Act), Pub. L. No. 105-276, § 577, 112 Stat. 2639, 2640–41 (codified at 42 U.S.C. § 13662(a) (Supp. V 1999)), provides additional evidence that, in enacting section 1437d(*l*)(6), Congress intended to preclude an innocent tenant defense. *See* HUD Brief 21 n.7, 42 n.16. That section of the Quality Housing Act requires PHAs or owners of federally assisted housing to establish standards or use leases with provisions that "allow the agency or owner . . . to terminate the tenancy or assistance for any household with a member . . . who the public housing agency or owner determines is illegally using a controlled substance." 42 U.S.C. § 13662(a). However the Quality Housing Act provision provides no support for HUD's position. Like section 1437d(*l*)(6), section 13662(a) creates a cause for termination without explicitly creating or prohibiting affirmative defenses to the cause. As demonstrated in the text, under typical landlord-tenant law, the existence of a cause for termination of tenancy is not in itself evidence of the absence of any affirmative defenses to termination on that ground.

II. HUD'S CONSTRUCTION OF SECTION 1437d(*l*)(6) IS UNREASONABLE

A. HUD previously attempted to eliminate public housing tenants' legal and equitable defenses to eviction and was rebuffed by Congress; the Court should not assume that Congress has implicitly eliminated a defense to eviction

Generally, when a PHA decides to terminate a tenant's lease, the tenant first has a right to contest the PHA's decision at an administrative grievance proceeding before defending against the eviction in court. 42 U.S.C. § 1437d(*k*) (1994 & Supp. V 1999) (directing HUD to promulgate regulations that require PHAs to provide administrative grievance procedures through which a tenant affected by an adverse PHA action may contest the PHA's determination that such action is merited); *see* 24 C.F.R. §§ 966.51(a)(1), 966.53(a) (2000) (implementing section 1437d(*k*)). If the eviction is based on the occurrence of drug-related criminal activity, Congress permits PHAs to bypass grievance proceedings so long as the state in which the PHA is located requires a judicial hearing prior to eviction and such court hearings "provide the basic elements of due process." 42 U.S.C. § 1437d(*k*); *see* 24 C.F.R. § 966.51(a)(2) (2000).

Congress requires HUD to make the determination whether state-court eviction proceedings satisfy due process. 42 U.S.C. § 1437d(*k*). Since 1975, HUD has defined the "elements of due process" to include the "[o]pportunity for the tenant . . . to present any affirmative legal or equitable defense which the tenant may have." 24 C.F.R. § 966.53(c)(3) (2000); *see* Public Housing Lease and Grievance Procedures, 40 Fed. Reg. 33,402, 33,407 (Aug. 7, 1975).

In 1988, HUD published a final rule which would have eliminated, among other things, the opportunity to present legal and equitable defenses as an element of due process.

Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. at 33,290–33,293, 33,304 (announcing, inter alia, adoption of proposed 24 C.F.R. § 966.2). Shortly thereafter, a congressional conference committee report on legislation to amend the McKinney Act specifically questioned the adequacy of the criteria HUD planned to use in making its due process determinations. H.R. Conf. Rep. No. 100-1089, at 102 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4395, 4486. When it enacted the legislation recommended by the conference report, Congress directed HUD to treat the regulations announced in its final rule as having only interim effect and to entertain additional public comments on the rules. Stewart B. McKinney Homeless Assistance Amendment Acts of 1988, Pub. L. No. 100-628, § 1013, 102 Stat. 3224, 3269 (1988). Subsequently, a federal court enjoined implementation of the regulations, *Nat'l Tenants Org. v. Pierce*, No. 88-3134, 1989 U.S. Dist. Lexis 18348, *9 (D.D.C. Jan. 25, 1989), and HUD withdrew the proposed regulations, reinstating the prior regulations, which contained the right to present legal and equitable defenses as an element of due process, Tenancy and Administrative Grievance Procedure for Public Housing, 54 Fed. Reg. 6,886 (Feb. 15, 1989).

When it next proposed changes to public housing grievance procedures, HUD retained the opportunity to present legal and equitable defenses as an element of due process. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 6,248, 6,252 (Feb. 14, 1991). As HUD explained, this requirement "signifies that the tenant must be able to raise in the proceeding any defense which would defeat the landlord's eviction claim for possession as a matter of substantive law." *Id.* When HUD promulgated the final regulations, it announced that, with an exception not relevant here, it had adopted "verbatim" the definition of due process elements contained in the original 1975 regulations. Public Housing

Lease and Grievance Procedures, 56 Fed. Reg. 51,560, 51,573 (Oct. 11, 1991).

When HUD attempted to limit tenants' grievance rights and, in establishing criteria for finding that state judicial eviction procedures satisfy due process, sought to eliminate the requirement that tenants have the right to present legal and equitable defenses, Congress stepped in and asked HUD to reconsider. Petitioners suggest that, because there is no express language in the statute creating an innocent-tenant defense, the Court should conclude that none exists. HUD Brief 19, OHA Brief 29. In light of HUD's previous attempt to eliminate tenants' defenses and Congress' intercession, Petitioners reverse the burden. The Court should not construe section 1437d(*l*)(6) as eliminating a tenant's defense to eviction absent clear statutory language expressly doing so.

B. Interpreting section 1437d(*l*)(6) as precluding an innocent-tenant defense is unreasonable in light of the prohibition in section 1437d(*l*)(2) of lease provisions that contain unreasonable terms and conditions

In considering whether HUD's preclusion of an innocent-tenant defense squares with congressional intent, the Ninth Circuit construed section 1437d(*l*)(6) in light of section 1437d(*l*)(2), which requires PHAs to use leases that do not contain unreasonable terms and conditions. Appendix to Petition for Writ of Certiorari in No. 00-1770 (Pet. App.) 13a–14a. The Ninth Circuit concluded that the eviction of innocent tenants would not further the policy objectives HUD identified and would lead to irrational results. For that reason, the court decided that a lease provision that prohibited an innocent tenant defense would be unreasonable. Pet. App. 14a–15a. Thus, the Ninth Circuit concluded, interpreting section 1437d(*l*)(6) to prohibit an innocent-tenant defense would be to construe the section as requiring PHAs to use leases that contain an unreasonable term, in conflict with the

prohibition against such terms in section 1437d(*l*)(2). *Id.* In order to read the sections harmoniously, the court construed section 1437d(*l*)(6) as permitting an innocent-tenant defense. *Id.*

HUD argues that the Ninth Circuit erred in interpreting section 1437d(*l*)(6) in light of section 1437d(*l*)(2)'s prohibition against unreasonable lease terms or conditions. HUD Brief 15 ("Congress's decision in Section 1437d(*l*)(6) to *require* inclusion of a lease term authorizing eviction of a tenant for a household member's drug-related criminal activity necessarily shows that Congress decided that such a term is *not* unreasonable . . . ."). But HUD begs the question, for it assumes what is to be proven, namely, whether section 1437d(*l*)(6) precludes an innocent-tenant defense.

The Ninth Circuit's interpretive methodology is sound. This Court has only recently explained that

> [i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal quotation marks and citations omitted). If there are independent reasons for believing that the elimination of an innocent-tenant defense would be unreasonable, then section 1437d(*l*)(6) should be interpreted as requiring the recognition of, or at least not precluding, that defense.

There are, indeed, reasons for believing that precluding an innocent-tenant defense would be unreasonable. First, HUD's interpretation of section 1437d(*l*)(6) undermines the central policy goal it purports to further. As HUD recognizes, Congress enacted section 1437d(*l*)(6) as a means to combat the use and sale of illegal drugs in public housing and the violence and other criminal behavior associated with the

drug problem. HUD Brief 3–4 (quoting policy provisions of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4181, 4301). HUD argues that the imposition of strict liability on public housing tenants creates "the maximum incentive [for tenants] to find out whether household members or guests are engaging in drug-related criminal activity, to warn them of the serious consequences of their activity, and to take whatever other steps are necessary to protect the security of the housing project." HUD Brief 35; *see also, e.g.*, Public Housing Lease and Grievance Procedures, 56 Fed. Reg. at 51,563.

It is a matter of common sense that, without assistance from the authorities, a tenant who discovers that a household member or guest is engaging in illegal drug-related activity will often not be able to prevent the individual from subsequently engaging in that behavior or permanently to remove the individual from the lease or from public housing property.[11] *See* Restriction on Representation in Certain Eviction Proceedings, 61 Fed. Reg. 63,756, 63,757 (Dec. 2, 1996) ("[I]nnocent family members often need legal protection from the drug abuser.") (explaining final rules of the Legal

[11] This is especially true of the large population of public housing tenants who are elderly or have disabilities. In 1998, 36% of public housing tenants were 62 years of age or more. HUD, A Picture of Subsidized Households (1998), http://www.huduser.org/datasets/assthsg/statedata98/descript.html. In 1998, over a third of public housing tenants over 62 had disabilities, as did one-fifth of those under 62. *Id.* Congress is acutely aware that elderly Americans are especially vulnerable to abuse and exploitation. *See, e.g.*, 42 U.S.C. §§ 3027(a)(15)(E), 3030d(a)(15), 3058i (1994) (providing for federal funding for and assistance in creating state elder protective services); S. Rep. No. 98-467 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 2989 (noting the "growing evidence of significant levels of elder abuse in this country") (report on proposed amendments to the Older Americans Act of 1965, 42 U.S.C. §§ 3001–3058ee (1994)). It is difficult to believe that Congress intended to permit the eviction of elderly public housing tenants who have been exploited by household members or guests, especially where the tenants knew nothing of the household member or guest's illicit activity.

Services Corporation). But since it would permit eviction whether the tenant knew or had reason to know of the illicit activity, HUD's interpretation of section 1437d(*l*)(6) gives tenants a *disincentive* to report serious drug problems to public housing authorities or the police.[12] Because tenants will know that if they seek the assistance of the authorities they will be subject to eviction, tenants will be less likely to take the "other steps [that] are necessary to protect the security of the housing project." HUD Brief 35; *see* Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 Tex. L. Rev. 1495, 1516–17 (1998). HUD's interpretation thus squarely conflicts with the central purpose underlying section 1437d(*l*)(6).[13]

[12] Indeed, HUD took the position before the Ninth Circuit that section 1437d(*l*)(6) permits the eviction of tenants who did everything possible to prevent the illicit activity. *See, e.g.*, Pet. App. 22a.

[13] HUD also argues that strict-liability is required in order to give PHAs "bargaining power" over tenants that is necessary to get them to agree to bar the individual engaged in drug-related criminal activity. HUD Brief 36. The idea that PHAs need strict liability in order to have bargaining power over tenants resembles the notion that one needs a hand grenade to kill a fly. The vast majority of tenants evicted from public housing cannot afford housing in the private market. The median income of public housing tenants in 1999 was $7,631. HUD, Recent Research Results, New Facts About Households Assisted by HUD's Housing Programs (October 2000), http://www.huduser.org/periodicals/rrr/rrr_10_2000/1000_6.html. That makes for a median monthly income of $636. The median national rent for a two-bedroom apartment in 1999 was $596. United States Department of Commerce, Census Bureau, American Housing Survey for the United States: 1999, at 226 (October 2000), *available at* http://www.huduser.org/datasets/ahs/ahs_1999.pdf. Even if an innocent-tenant defense is available, public housing tenants must establish the factual basis for this defense in order to avoid eviction. This is no easy task, especially for the many public housing tenants who are unrepresented in eviction proceedings. Moreover, courts in jurisdictions that recognize an innocent-tenant defense do not hesitate to evict when the tenant fails to convince the court that he or she reasonably lacked knowledge of the illicit activity that was the cause for termination. *See, e.g., Williams v.*

Second, HUD's interpretation of section 1437d(*l*)(6) as prohibiting an innocent-tenant defense is inconsistent with Congress' endorsement of the good cause eviction requirements in public housing that were first developed in the courts and later codified by HUD and Congress. Congress has itself for nearly two decades required PHAs to use leases that provide "that the public housing agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 U.S.C. § 1437d(*l*)(5) (1994 & Supp. V 1999).

The good cause standard evolved first as a matter of case law. During the McCarthy Era, a number of PHAs required tenants to sign loyalty oaths as a condition of their continued tenancy. When tenants refused to sign, the PHAs attempted to evict them. A number of courts held that the tenants' refusal was not good cause to evict, because eviction on that ground had no rational relationship to the purposes of public housing. *See, e.g., Hous. Auth. v. Cordova*, 279 P.2d 215 (Cal. App. Dep't Super. Ct. 1955); *Chicago Hous. Auth. v. Blackman*, 122 N.E.2d 522 (Ill. 1954).

In the mid-1960s, HUD began administrative implementation of the good cause standard. HUD first urged and then required PHAs to provide tenants with the reasons for the proposed termination of their leases. *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 272–63 & n.8, 275 (1969) (discussing HUD circulars). Thereafter, it limited the sorts of reasons PHAs could give to terminate tenancies, forbidding PHAs to evict tenants except for "violation of the terms of the lease or other good cause." HUD, Consolidated Annual

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Hawai'i Hous. Auth., 690 P.2d 285 (Haw. Ct. App. 1984); *Spence v. Gormley*, 439 N.E.2d 741 (Mass. 1982); *Romero v. Martinez*, 721 N.Y.S. 2d 17 (N.Y. App. Div. 2001). Thus, the simple threat of eviction—and the likely homelessness or substandard housing that would result—gives PHAs substantial bargaining power over tenants, even if they have recourse to an innocent-tenant defense.

Contributions Contract, Part II, HUD Form No. 53011, § 203(B) (Nov. 1969). HUD then included the good cause requirement when it promulgated its first regulations on PHA leases and grievance procedures. Lease and Grievance Procedures, 40 Fed. Reg. at 33,405. In 1983, Congress incorporated the good cause requirement into the Housing Act. Housing and Urban Renewal Recovery Act of 1983, Pub. L. No. 98-181 § 204, 97 Stat. 1155, 1179 (codified as amended at 42 U.S.C. § 1437d(*l*)(5) (1994 & Supp. V 1999)).

The good cause doctrine is built upon the principle that, because of the importance of the benefit, a public or federally subsidized housing tenant should not be deprived of his or her home in the absence of serious misconduct for which he or she is responsible. *See, e.g., Maxton Hous. Auth. v. McLean*, 328 S.E.2d 290 (N.C. 1985); *Messiah Baptist Hous. Dev. Fund Co. v. Rosser*, 400 N.Y.S.2d 306 (N.Y.City Ct. 1977); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341 (W.Va. 1988). Permitting the eviction of persons who bear no culpability for the illicit activity that is the basis for the eviction action is flatly inconsistent with this principle. It is a "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). Evicting innocent tenants offends that basic concept and so is unreasonable. In any case, had Congress intended to erode what is now a cornerstone of the public housing tenancy, it would not have done so by implication.

C. The legislative history of section 1437d(*l*)(6) evinces Congress' intent to permit tenants to assert an innocent-tenant defense during judicial eviction proceedings

There is little legislative history directly relevant to the questions presented in this case. What exists supports the conclusion that Congress did not intend to foreclose tenants'

ability to present an innocent-tenant defense at a judicial eviction hearing.

1. The predecessor to what is now section 1437d(*l*)(6) was originally enacted as part of the Anti-Drug Abuse Act of 1988, § 5101, 102 Stat. at 4300. There exists no conference committee report for this act.

The sole contemporaneous legislative history concerning the provision making drug-related criminal activity a cause for termination are the two sentences that appear in each of the Senate and House sponsor's section-by-section description. Both sponsors simply paraphrase the statutory text of section 1437d(*l*)(6). 134 Cong. Rec. 32,692, 33,148, 33,149, 33,186 (1988). HUD notes the Senate sponsor's statement that the statutory provision "'codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families, or their guests engage in drug-related criminal activity.'" HUD Brief 38 (quoting 134 Cong. Rec. at 33,186) (alteration omitted). HUD suggests that the regulations to which the Senate sponsor referred were those promulgated by HUD on August 30, 1988, *id.* at 38, and that Congress "specifically adopted the approach of the HUD regulations," *id.* at 38–39.[14]

The regulation in question required PHAs to use leases that provide that the tenant "[s]hall not engage in criminal activity in the dwelling unit or premises, and shall prevent

[14] HUD notes the regulations promulgated on August 30, 1988 were subject to a temporary restraining order, that Congress directed HUD to treat the regulations as interim rather than final and to reopen notice and comment, that the court that issued the restraining order thereafter preliminarily enjoined implementation of the regulations, and that HUD ultimately withdrew the regulations. HUD Brief at 39 n.13. But HUD fails to mention that the congressional conference committee report for the legislation that directed HUD to reconsider the regulations expressed serious reservations about HUD's elimination from among the "elements of due process" the opportunity to present legal and equitable defenses—such as breach of the warranty of habitability—during judicial eviction hearings. *See supra* Part II.A.

criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members." Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. at 33,227. While HUD would like the Court to infer that the regulation, and the predecessor to section 1437d(*l*)(6), unequivocally permitted the eviction of tenants who did not know and had no reason to know of the drug-related criminal activity, this is not how HUD understood its regulation in 1988. HUD explained that under the lease provision required by the regulation "[t]he tenant has a positive duty to 'prevent' the prohibited activities by third parties. The tenant does not escape responsibility if the tenant and household *passively condone* prohibited acts. Instead, the tenant and household must do what is necessary to 'prevent' the prohibited acts." *Id.* at 33,229 (emphasis added).

At the very most, HUD's explanation of its regulation simply does not speak to the question of whether eviction is permitted under the regulation when the tenant did not know and had no reason to know of the prohibited activity. However, HUD's explanation of the purpose of the regulation—that it is meant to prevent a tenant from escaping responsibility if he or she passively condones illicit activity—demonstrates that in 1988 HUD believed that the regulation only applied to tenants who knew of the illicit activity.

2. Amici Council of Large Public Housing Authorities et al. argue that the 1989 enactment and subsequent repeal of a statutory provision protecting the rights of tenants "not involved" in drug-related activity is further evidence that, in enacting the predecessor to section 1437d(*l*)(6), Congress intended to prohibit the assertion of an innocent-tenant defense. Brief for Amici Council of Large Public Housing Authorities et al. (CLPHA Brief) 12–14.

As discussed above, if a PHA decides to evict a tenant for drug-related criminal activity, the PHA may bypass the administrative grievance process if the PHA is located in a jurisdiction in which HUD finds that judicial eviction proce-

dures satisfy the elements of due process. *See supra* Part II.A. The statute the CLPHA brief discusses directed HUD not to authorize a waiver of administrative grievance procedures in cases involving eviction for drug-related criminal activity unless the jurisdiction seeking waiver, in addition to satisfying HUD's due process standard, ensured that the eviction of a household member involved in drug-related activity did not "'affect the right of any other household member who is not involved in such activity to continue tenancy.'" CLPHA Brief 13 n.23 (quoting Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404(b), 103 Stat. 97, 128).

The CLPHA brief suggests that the subsequent repeal of this provision evinces Congress' intent to preclude an innocent-tenant defense.[15] However, as the District Court in this case concluded, the statutory provision that was repealed simply does not speak to the issue central to this case:

> The temporary extra "protection" [provided by the statute] applied to household members who were not *personally involved* in the criminal activity, but who may have had knowledge or a reason to know of the drug-related criminal activity. The statute says nothing about tenants who did not know, and had no reason to know, of the criminal activity.

Pet. App. 150a.

3. The only piece of legislative history that speaks directly to the questions presented is a report from the Senate Committee on Banking, Housing, and Urban Affairs that accompanied 1990 legislation amending section 1437d(*l*)(6).[16] In that report, the committee stated that it

> anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

S. Rep. No. 101-316 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941; *see also id.*, *reprinted in* 1990 U.S.C.C.A.N. at 5889 ("[T]he Committee assumes that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t." (discussing similar provision for the Section 8 program)).[17]

HUD describes this passage as "merely recogniz[ing] that PHAs . . . have discretion in deciding whether, if at all, to evict tenants who have violated the Section 1437d(*l*)(6) lease provision, and urg[ing] the importance of a wise use of that discretion." HUD Brief 43. But HUD's characterization is only half the story. The committee did not merely exhort PHAs to use their wise discretion. It also stated that the question whether to evict "require[s] the wise exercise of humane judgment by the PHA *and the eviction court*," and that eviction courts should exercise their discretion to prevent

---

[15] Section 404 of the Supplemental Appropriations Act was repealed by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1990, Pub. L. No. 101-144, 103 Stat. 839, 853.

[16] The legislation was the Cranston-Gonzales National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4185 (1990).

[17] HUD attempts to undermine the relevance of the committee report by arguing that the report discussed a Senate bill different from the one that was enacted. HUD Brief 43. But the ways in which the Senate bill differed from the final legislation, documented by HUD in its brief, are wholly irrelevant to the question of Congress' intent concerning an innocent-tenant defense because the changes relate only to the scope of the cause for termination. *See id.* at 43.

the eviction of innocent tenants. S. Rep. No. 101-316, *reprinted in* 1990 U.S.C.C.A.N. at 5941 (emphasis added). If the committee did not intend for judges to consider tenants' claims of reasonable lack of knowledge, then it would make no sense for it to state that eviction courts should exercise "humane judgment." This is because, if tenants do not have available an innocent-tenant defense, then the only thing for an eviction court to decide is whether there is a cause for eviction (e.g., whether the drug-related activity occurred); in that event, the court would have no occasion to exercise its "humane judgment."[18]

The only legislative history that bears directly on the issue before the Court demonstrates that Congress intended to permit tenants to assert innocence as a defense to eviction under the required lease provision and that HUD's contrary interpretation is unreasonable.

[18] Indeed, this is HUD's misguided view of the role of eviction courts. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776, 28782 (May 24, 2001) ("The statute does not authorize courts to exercise this same type of discretion. Courts determine whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction of the persons whom the PHA seeks to evict."). HUD's current interpretation is flatly inconsistent with the committee's statement that eviction courts will use their discretion in deciding these public housing eviction cases. Note that this is not how HUD previously viewed the role of the eviction court. In its notice to public housing directors explaining President Clinton's "One Strike and You're Out" policy, HUD informed public housing agencies that if they "do seek eviction" of household members not directly involved with the drug-related activity, "PHAs should be prepared to persuade a court that eviction is justified." HUD, Office of Public and Indian Housing, "One Strike and You're Out" Screening and Eviction Guidelines for Public Housing Authorities, Notice PIH 96-16 (HA), at 8 (April 12, 1996).

D. Since Congress enacted section 1437d(*l*)(6) against a background of state landlord-tenant law in which there exist affirmative defenses to causes for termination, had Congress intended to eliminate such defenses, it would have said so

The Court has explained that where a statute fails to speak to an issue, deference to agency regulations is appropriate under *Chevron* when the issue involved requires the application of the statute's general policies to specific circumstances. In that case, "the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999). However, this case does not involve a situation in which Congress could not "anticipate all circumstances in which a general policy must be given specific effect." *Id.* at 392.

In establishing federally-assisted public housing, Congress created a property interest that is an amalgam of federal and state law. As HUD has explained,

> the procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.
>
> State laws are binding without incorporation in a Federal rule, or in the Federally-required lease requirements. State tenant protections may be enforced through the State courts or other procedures available under State law, without any need to create a Federal right to State law protections.

Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. at 33,257; *see also* Tenancy and Administrative Grievance Procedure for Public Housing, 56 Fed. Reg. at 51,565 ("The Federal law defines minimum protections for the Federally assisted public housing tenant, but does not preempt additional protections or rights provided by the State which do not violate the Federal law."). When en-

acting and amending section 1437d(*l*)(6), Congress was well aware of the hybrid nature of the public housing leasehold interest. More specifically, it was aware that public housing tenants could and routinely do assert state-law defenses to eviction from public housing. *See e.g., supra* notes 4, 14.

The distinction between causes for termination of tenancy and possible defenses to such causes is well established in landlord-tenant law. *See supra* Part I. Indeed, various states have recognized an affirmative innocent-tenant defense to for-cause evictions. *See supra* note 9. Congress specifically chose to require PHAs to use leases that create a specified cause for termination. Had Congress intended to eliminate a central element of the public housing tenancy, one would have expected Congress to have stated so explicitly.[19] *See* Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may . . . ask whether the legal question is an important one. Congress

[19] HUD itself recognized that Congress intended to leave in place any state-law defenses to eviction. In announced proposed regulations implementing the 1990 amendments to the predecessor to section 1437d(*l*)(6), HUD stated that the proposed regulations would have no federalism implications under Executive Order No. 12,612. Public Housing Lease and Grievance Procedures, 56 Fed. Reg. at 51,575; *see also* Exec. Order No. 12,612, 52 Fed. Reg. 41685, § 4(a) (October 26, 1987) ("Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute."), *revoked by* Exec. Order No. 13,083, 63 Fed. Reg. 27,615 (May 14, 1998). Similarly, in promulgating its most recent regulations implementing section 1437d(*l*)(6), HUD expressly stated that the regulations do not preempt state law within the meaning of Executive Order No. 13,132. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. at 28,791; *see also* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, § 4(a) (Aug. 14, 1999) (containing language substantially similar to Exec. Order No. 12,612 § 4(a)).

is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); *cf.* 42 U.S.C. § 1437d(*l*)(7) (1994 & Supp. V 1999) (requiring that PHAs use leases providing tenants the right to examine "documents, records, or regulations" directly related to the PHA's decision to evict, "notwithstanding any State law" to the contrary).

This is not a case in which Congress expected HUD to "fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 150. In light of the hybrid nature of public housing tenancies, Congress' silence on the viability of affirmative defenses to eviction under the lease provision mandated by section 1437d(*l*)(6) is an indication of its intent to permit tenants to continue to avail themselves of all defenses otherwise available to them as a matter of substantive law, including that of innocence.

CONCLUSION

The two questions on which the Court granted certiorari differ in a slight but important respect. The question in No. 00-1770 is whether "the *lease clause* provided for in 42 U.S.C. [§] 1437d(*l*)(6) (Sup. V 1999) is *violated* by drug-related criminal activity of household members, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug-related activity." HUD Brief I (emphasis added). The question in No. 00-1781 is whether "42 U.S.C. § 1437d(*l*)(6) *permits termination of a tenancy* if a tenant did not know, or have reason to know, that a household member or guest engaged in drug-related criminal activity." OHA Brief i (emphasis added).

Amici have argued that while section 1437d(*l*)(6) requires the use of leases that create a cause for termination when a household member engages in drug-related criminal activity, the existence of this cause is fully consistent with the existence of an affirmative innocent-tenant defense to eviction.

For this reason, Amici urge the Court to answer the question in No. 00-1770 "Yes, but . . . ." Yes, the lease clause is violated by the drug-related criminal activity of a tenant's household members, regardless of the tenant's knowledge, but the tenant may assert an innocent-tenant defense at a judicial eviction hearing. For the same reason, Amici urge the Court to answer the question in No. 00-1781 "No," because section 1437d(*l*)(6) permits public housing tenants to assert reasonable lack of knowledge as a defense in a judicial eviction proceeding.

Because the judgment of the Court of Appeals is consistent with these answers, it should be affirmed.

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December 20, 2001

Nos. 00-1770 & 00-1781

DEC 20 2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

—v.—

PEARLIE RUCKER, *et al.*,

Respondents.

OAKLAND HOUSING AUTHORITY, *et al.*,

Petitioners,

—v.—

PEARLIE RUCKER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NORTHERN CALIFORNIA, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. The issue in this case is whether public housing tenants may lawfully be evicted from their homes without even any allegation by the government that the evicted tenants have engaged in personal wrongdoing or that any illegal activity has taken place in their homes. For tenants with limited resources and thus a limited capacity to find somewhere else to live, the consequences of the government's harsh eviction policy can often be severe. More broadly, this case raises fundamental questions about the scope of the government's authority to pursue its "war on drugs" without regard to principles of individual guilt and responsibility that have always been central to our conception of justice. The proper resolution of this case is therefore a matter of significant concern to the ACLU and its members throughout the country.

STATEMENT OF THE CASE

This case involves the eviction of three tenants and their families from public housing in Oakland, California. Respondent Pearlie Rucker is a 63 year-old woman who has lived in public housing for 13 years. She currently lives

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

with her mentally disabled daughter, her two grandchildren, and her great-grandchild. Petitioners assert as a ground for her eviction that Ms. Rucker's mentally disabled daughter possessed cocaine three blocks from her apartment. Ms. Rucker regularly searches her daughter's room for evidence of drug activity and has warned her and others that drug activity in the apartment could result in their eviction.

Respondent Willie Lee is a 71 year-old man who has lived in Oakland public housing for 25 years. He currently lives with his grandson. Petitioners assert as a ground for his eviction that Mr. Lee's grandson possessed marijuana in a parking lot of the housing complex. Petitioners do not allege that Mr. Lee had any knowledge of his grandson's marijuana possession.

Respondent Barbara Hill is a 63 year-old woman who has lived in the same public housing apartment for 30 years. Like Mr. Lee, she currently lives with her grandson. Petitioners assert as a ground for her eviction that her grandson possessed marijuana in the parking lot of the housing complex. Appellants do not allege that Ms. Hill had any knowledge of her grandson's marijuana possession.

Petitioners contend that 42 U.S.C. §1437d(*l*)(6), part of the National Housing Act, authorizes eviction of public housing tenants and their families if any member of the household or guest engages in any drug-related criminal activity (including possession of marijuana) on or off the public housing premises, whether or not the tenant had any knowledge of, or ability to control, the illegal activity.[2]

---

[2] In its current version, §1437d(*l*)(6) provides:

> [A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises (continued...)

Thus, under petitioner's construction of the statute, an indigent parent or grandparent who has done everything within her power to discourage drug use is nonetheless subject to eviction if a child in her care experiments with marijuana, even once and even outside the home.

The district court issued a preliminary injunction, holding that petitioners' refusal to recognize an "innocent tenant" defense was inconsistent with the statute and congressional intent. *Rucker v. Davis*, No. 98-00781, 1998 WL 345403 N.D.Ca. June 19, 1998). On appeal, the preliminary injunction was initially reversed by a divided panel of the Ninth Circuit, 203 F.3d 627 (9th Cir. 2001). However, the panel decision was subsequently vacated by the *en banc* court, which both reinstated the preliminary injunction and reaffirmed that petitioners' unyielding interpretation of the statutory language would, if adopted, raise serious constitutional issues. 237 F.3d 1113 (9th Cir. 2001).

SUMMARY OF ARGUMENT

Except in narrow circumstances not present here, the fundamental requirements of due process prohibit the government from taking adverse action against one person based on the illegal conduct of another person. Yet, that is precisely what occurred in this case. Each of the respondents faced eviction from public housing under petitioners' no-fault eviction policy, although none of the respondents was

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[2] (...continued)

> engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of the tenancy.

Among other changes, the 1996 amendments to §1437d(*l*)(6) eliminated the requirement that illegal drug activity would trigger an eviction only if it occurred on or "near" the public housing premises.

accused of using illegal drugs, or authorizing the use of illegal drugs, either on or off the premises. The fact that respondents are indigent tenants who face dire personal consequences only magnifies the fundamental unfairness of petitioners' policy. This Court has often stressed that constitutional rights are personal, and so is guilt. What the government proposes to do in this case ignores the second principal and violates the first. There were thus ample grounds for the court of appeals to invoke the doctrine of constitutional doubt in concluding that the challenged regulations are inconsistent with the underlying statute.[3]

Petitioners would like to divorce this case from its factual context and argue it in the abstract. The factual context is critical, however, both in understanding what is at stake and in determining which legal rules should apply. This Court has repeatedly stressed, in a variety of contexts, the importance of protecting the home against arbitrary government action. The Court has also consistently emphasized, especially in its recent jurisprudence, that the government must respect constitutional limits when it seeks to interfere with vested property rights. Here, both the terms of the statute and the terms of the lease give respondents a vested property right in their homes. In seeking to evict respondents from their homes without any evidence of individual wrongdoing, respondents are arbitrarily disturbing that vested property interest in a manner that inevitably produces the sort of unfair results that the facts of this case highlight.

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[3] *Amici* support the interpretation of the statute adopted by the lower courts in this case, largely for the reasons set forth in respondents' brief. To avoid repetition, however, this brief focuses exclusively on the merits of respondents' substantive due process claim. At the very least, the constitutional flaws inherent in petitioners' view of the statute are a relevant consideration under well-settled rules of statutory construction. *E.g.*, *National Labor Relations Board v. Catholic Bishops*, 440 U.S. 490 (1979).

Petitioners cite this Court's forfeiture decisions for the proposition that the Constitution does not require an "innocent tenant" defense and that the lower courts erred in therefore reading one into the statute. But that reliance is misplaced for at least two reasons. First, the forfeiture provisions enacted by Congress as part of the same chapter and subtitle as the original version of the statute at issue in this case expressly stipulated that a forfeiture claim could not be based on acts "committed or omitted without the knowledge or consent of the [property] owner." 21 U.S.C. §881(a)(7). Second, *Bennis v. Michigan*, 516 U.S. 442 (1996), on which petitioners' rely, is not nearly as sweeping as petitioners contend. *Bennis* plainly does not reject an "innocent owner" defense in circumstances where the forfeited property is unconnected to any crime. That connection was indisputably present in *Bennis*; it is just as indisputably absent here.

Petitioners are equally misguided in pointing to the lease as a justification for these evictions. Given the disparity of bargaining power, the notion that public housing tenants voluntarily waive their rights by signing a standardized lease prepared by the public housing authority is fanciful, at best. To the contrary, the lease provision authorizing the eviction of innocent tenants represents a coerced and unconstitutional condition that is just as unenforceable as a provision authorizing a tenant's eviction because a family member or guest supported an unpopular political cause. It is true, of course, that the government has an interest in eliminating illegal drug activity that it does not have in eliminating political dissent. But the government cannot pursue even a legitimate goal through unconstitutional means, which is what it has done in this case by abandoning the principle of individual guilt.

Because that principle represents a fundamental aspect of substantive due process, this case involves more than a simple decision about the allocation of scarce government

resources. Accordingly, petitioners' plea for deference and rational basis review should be rejected. Even under petitioners' proposed standard, however, a policy that evicts indigent tenants from their home cannot be described as a reasoned response to the problem of illegal drug activity occurring off-premises, and without the tenant's knowledge or consent, albeit by members of the tenant's household. Indeed, having eliminated the requirement that the illegal drug activity must occur "near" the public housing site, any plausible relationship between the challenged policy and the government's interest as a landlord in maintaining a drug-free environment has been strained to the breaking point.

ARGUMENT

I. PETITIONERS' NO-FAULT EVICTION POLICY VIOLATES SUBSTANTIVE DUE PROCESS BY THREATENING INNOCENT TENANTS WITH EVICTION FROM THEIR HOMES

The government in this case seeks to defend its authority to evict indigent and wholly innocent tenants from public housing -- inevitably driving many to homelessness -- because other family members or guests have engaged in illegal activity outside the tenant's home and without the tenant's knowledge or consent.

This draconian policy violates the substantive due process norm of individual guilt, which is fundamental to our concept of justice, and deeply embedded in our nation's history and traditions. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). "In our jurisprudence, guilt is personal." *Scales v. United States*, 367 U.S. 203, 224-25 (1960). This is true in the criminal context, where some element of scienter is generally required to establish individual culpability. *E.g., Morrisette v. United States*, 342

U.S. 246, 264-65 (1952). It is also true in civil cases.[4] As this Court just recently observed in a suit seeking damages against a media defendant for broadcasting a private conversation that had been illegally intercepted by someone else: "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper*, 532 U.S. 514, ___, 121 S.Ct. 1753, 1764 (2001); *see also Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, ___, 121 S.Ct. 2351, 2380 (2001)(Thomas, J., dissenting)(same observation).

The Court's adherence to these principles has never turned on the formality of whether the government sanction represents a penalty or punishment in the sense necessary to invoke the Eighth Amendment or Double Jeopardy Clause.[5] Rather, the Court has taken a much more practical approach. For example, the issue in *Plyler v. Doe*, 457 U.S. 202 (1982), was whether Texas could exclude undocumented immigrant children from its public schools. Although the Court relied on equal protection rather that due process, its holding was written in language that broadly embraces both concepts. Thus, the Court explained in one particularly pivotal passage, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against its children does not comport with *fundamental conceptions of justice*." *Id.* at 220 (emphasis added).

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[4] *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490-91 (1915)(invalidating civil penalty under Due Process Clause for conduct that involved "no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct").

[5] Even in those terms, there is a significant Eighth Amendment claim in this case under the Excessive Fines Clause, which respondents have briefed.

For similar reasons, the Court has repeatedly rejected as unconstitutional efforts to deny government benefits to children born out of wedlock. The rationale of those decisions was succinctly expressed in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972)(emphasis added): "[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that *legal burdens should bear some relationship to individual responsibility or wrongdoing*. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual -- as well as unjust -- way of deterring the parent."

In *Plyler* and the illegitimacy cases, the Court's concern was that the government had misdirected its attention against innocent children who "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Petitioners' actions in this case suffer from the same logical fallacy and the same constitutional infirmity. The indigent tenants who brought this action did not engage in any illegal drug activity and the government has not even claimed that they had any ability to control those who did engage in such activity outside the home. Yet, through no fault of their own, respondents are now faced with the loss of a significant property interest and the right to continue living in their own homes. At a minimum, those deprivations are surely comparable to the losses suffered in other cases where this Court has insisted, under both equal protection and substantive due process, that the government must present at least some evidence linking the person or property to the harm the government seeks to avoid. Here, the challenged policy does not require any such link and, so far as the record reveals, there is absolutely none.

A. By Evicting Respondents From Their Homes, Petitioners' Policy Abridges Substantial Property And Liberty Interests

Although the Court has never squarely held that public housing tenants have a property interest in their leasehold, in *Greene v. Lindsey*, 456 U.S. 444 (1982), the Court struck down an Oregon forcible entry and detainer statute that failed to provide public housing tenants with notice. In finding that the Fourteenth Amendment was violated, the Court's discussion proceeds from the assumption that public housing tenants have "a significant interest in property, indeed of the right to continued residence in their homes." *Id.* at 451. *See also Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 283-84 (1969). The existence of a property interest in public housing tenancies is consistent with this Court's decisions in other contexts. *See Goldberg v. Kelly*, 397 U.S. 254 (1970)(welfare recipients have property interest); *Perry v. Sinderman*, 408 U.S. 593 (1977)(college professor who had understanding that he would not be fired, arising from *de facto* tenure policy, has property interest); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)(government employee who could not be fired except for cause has a protected property interest). *See also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)(property under the due process clause is an interest to which government has given someone an entitlement). These cases all recognize that the property protected by the constitutional right to due process is not limited by traditional notions of real or chattel property. The term also includes certain entitlements, benefits, and expectations that are statutorily or contractually created. *Id.* In this case the property interest in public housing derives from both sources.[6]

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[6] *Amici* recognize that these cases define the procedural protections that (continued...)

Specifically, the property interest at stake in this case is very plainly established by statute and by the terms of the lease itself. The federal public housing program was established in 1937 in response to an acute shortage of "decent and safe dwellings for low income families." 42 U.S.C. §1437. Understanding that these low income tenants face grave adversity, Congress put a number of protections in place that limit the ability of local public housing authorities (PHAs) to evict. In §1437(d)(*l*)(2) itself, the local PHAs are prohibited from using leases with unreasonable terms and conditions. Another subsection also provides that the leases must not permit the PHA to terminate tenancies except for "serious or repeated violation of the terms or conditions of the lease or for other good cause." §1437d(*l*)(5). Read together, these provisions of subsection (d) are sufficient to create a property interest for purposes of the Due Process Clause.[7]

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[6] (...continued)
flow from the Due Process Clause. Those protections would be rendered meaningless, however, if the property interests it protects could be terminated for arbitrary reasons unrelated to individual guilt. This Court has emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, *see, e.g., Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)(the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, *see, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986)(the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). *See also County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998)(making the foregoing observation about the procedural and substantive protections of the Due Process Clause).

[7] There is wide agreement on this point in the lower courts. *See Esca-*
(continued...)

The case for recognition of a protectable property interest for public housing tenants is even stronger than in the cases involving entitlement programs or employment. The parties have entered into a lease agreement that defines the terms and conditions of the tenancy. Public housing tenants are required to contribute up to 30 percent of their adjusted monthly income as rent. 42 U.S.C. §1437a(a)(1). Pursuant to §1437d(*l*)(5), the lease specifically provides that an eviction must be based on repeated violations of the lease terms or "good cause." These regulatory safeguards create an expectation that the law acknowledges and protects. "The expectation of uninterrupted occupation and privacy exist whether the home is held in fee or by lease. A leasehold is subject to constitutional protections against arbitrary forfeitures by government." *United States v. Leasehold Interest in 121 Nostrand Avenue*, 760 F.Supp. 1015, 1027 (E.D.N.Y. 1991), citing *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976)(leasehold interest is a form of property protected by the Fifth Amendment against uncompensated taking).[8]

This conclusion is reinforced by examination of the leg-

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[7] (...continued)
lera v. New York City Housing Authority, 425 F2d 853, 861 (2nd Cir. 1970); *Davis v. Mansfield Metropolitan Housing Authority*, 751 F.2d 180 (6th Cir. 1984); *Jeffries v. Georgia Residential Financial Authority*, 678 F.2d 919 (11th Cir. 1982); *see also Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981)(tenants have property interests in subsidized housing payments if mandated by law); *Ressler v. Pierce* 692 F.2d 1212 (9th Cir. 1982)(section 8 applicants have protected property interest).

[8] In discussing due process protections of public housing tenants, it should not be forgotten that, by definition, these low income tenants will have very limited resources to contest an eviction, and no right to a government appointed lawyer. Nelson H. Mock, "Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties," 76 Tex.L.Rev. 1495, 1505-06 (1998).

islative history that led to the adoption of the statute at issue in this case. In the same chapter and subtitle of the Anti-Drug Abuse Act of 1988, Congress passed both the original version of subsection (6) and also amended a pre-existing civil forfeiture provision of the Controlled Substances Act, 21 U.S.C. §881(a)(7). The two statutes at issue were enacted together as parts of a single legislative scheme to combat drug abuse in public housing. The legislative history indicates how Congress envisioned the statutes working together:

> Chapter 1 of this subtitle codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families or their guests engage in drug-related criminal activity. It also allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing leases are considered property with respect to civil forfeiture laws.

134 Cong. Rec. S17360-02 (Nov. 10, 1998).

The forfeiture provision was amended by inserting the phrase "(including any leasehold interest)" into the text of the pre-existing statute. The amended statute then read in relevant part:

> The following shall be subject to forfeiture to the United States . . .
>
> > (7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of

> this subchapter . . . *except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

21 U.S.C. §881(a)(7) (emphasis added).[9] Although the court below clearly understood the statutes to be "different animals," it concluded that Congress meant them to be read consistently since they govern the same subject matter and were enacted at the same time. 237 F.3d at 1121-22. More importantly, by including public housing leaseholders in its definition of property that may be subject to forfeiture, Congress clearly expressed its intention to treat those leaseholds as property interests indistinguishable from any other property interest.

Finally, the property interest at stake here is reinforced by an undeniable liberty interest because it involves respondents' homes. "[S]afeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right." *Hodgson v.*

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[9] The "innocent owner" defense which then appeared in 21 U.S.C. §881(a)(7) is now codified at 18 U.S.C. §983(d) as part of the general rules for civil forfeiture procedures. In enacting §983(d), Congress clarified that an "innocent owner" is one who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. §983(d)(2)(A).

Minnesota, 497 U.S. 417, 448 n.33 (1990). Thus, an "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). *See also United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993)("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance").

The rationale for providing heightened protections against governmental actions against the home is especially compelling in the case of public housing tenants:

> For the poor, the shortage of livable low-priced housing is especially acute. Tenants -- and especially their minor children --, who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized.

United States v. The Leasehold Interest in 121 Nostrand Avenue, 760 F.Supp. at 1018; *see also United States v. Robinson*, 721 F.Supp. 1541, 1544 (D.R.I. 1989)("an order of forfeiture here would be, in effect, a sentence of homelessness for the defendants and her three young children"); *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300, 1306 (4th Cir. 1992)("the summary eviction of tenants from a public housing project is hardly comparable to the seizure of a yacht"). In addition to the possibility of being turned out into the street with nowhere to go, an eviction may result in the breakup and scattering of the family. It may also result in the loss of an individual's furniture, clothing, personal effects and important papers if they are unable to find a new home or place to store those items in the interim. Simply put, public housing is the refuge of last resort for the individual respondents in this case and many other elderly and low-income residents.

B. By Disregarding The Principle Of Individual Guilt, Petitioners' Policy Violates Core Notions Of Fundamental Fairness

Under the circumstances of this case, petitioners' contention that an otherwise unconstitutional government policy should be sustained because it is included in a lease imposed on indigent tenants seeking public housing is both self-serving and wrong. As a matter of fact, it ignores the obvious reality that public housing leases are not negotiated agreements and the parties do not possess anything remotely resembling equivalent bargaining strength. As a matter of positive law, it misrepresents the statutory scheme established by Congress, which prohibits petitioners from coercing compliance with unreasonable lease terms and conditions. 42 U.S.C. §1437d(*l*). And, as a matter of constitutional doctrine, it disregards the fundamental principle that any waiver of constitutional rights must be knowing and voluntary. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458 (1938).

Indeed, were petitioners correct, a public housing tenant could just as easily be evicted for violating a lease provision requiring a tenant to vote for designated political candidates. Even petitioners would presumably not defend the constitutionality of such a provision. Petitioners' reliance on the lease therefore begs the question. If a lease condition is constitutional, it can certainly be enforced. If it is an unconstitutional condition, then the fact that respondents signed the lease is immaterial

To the extent that they respond to the due process argument at all, petitioners point to the forfeiture cases as support for their position. Just the opposite is true. In recent years, virtually every member of this Court has expressed disapproval of forfeitures where, as here, the property itself has not been used for crime and where the individual prop-

erty owner is not guilty of any wrongdoing. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)(observing that serious constitutional questions would be raised by the forfeiture of property by an owner who "was uninvolved in and unaware of illegal activity" and who "had done all that could be reasonably expected to prevent the proscribed use of his property"); *Austin v. United States*, 509 U.S. 602 (1993)(placing limits on the government's ability to define property as an instrumentality of the crime); *id.* at 627-628 (Scalia, J., concurring in part, concurring in judgment)(same); *Bennis v. Michigan*, 516 U.S. at 466-467 (Stevens, Souter, Breyer, JJ., dissenting)(recognizing innocent owner defense); *id.* at 472-473 (Kennedy, J., dissenting) (same); *id.* at 458 (Ginsburg, J., concurring)(the government "has not embarked on an experiment to punish third parties . . . Nor do we condone any such experiment"); *id.* at 456 (Thomas, J., concurring)(limiting forfeiture to cases where property is misused).

Bennis is the Court's most recent decision on point. It involved the seizure of an automobile owned jointly by a Michigan husband and wife. Contrary to petitioners' view, however, *Bennis*, does not support their position on the constitutional issues presented by this case. If anything, it refutes it. The car in *Bennis* was forfeited under Michigan's abatement statute because it was used by the husband to solicit a prostitute. The wife, who had obviously not approved the arrangement, alleged that the statutory abatement scheme deprived her of due process in violation of the Fourteenth Amendment. In a straightforward application of its forfeiture cases dating back to the early nineteenth century, a nevertheless sharply divided Court held in a 5-4 decision that property entrusted to another is subject to forfeiture if it is used for illegal activity. 516 U.S. at 449. *See also Calero-Toledo*, 416 U.S. 663 (yacht rental); *Van Oster v. Kansas*, 272 U.S. 465 (1926)(automobile on loan); *J.W. Goldsmith, Jr.- Grant Co. v. United States*, 254 U.S. 505 (1921)(automobile sale where the dealer held title as security on note); *Dobbins v. Distillery*, 96 U.S. 395 (1877)(property used by lessee); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844)(vessel); *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)(vessel).

In these cases, forfeiture has been justified on two theories -- that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and can be properly punished for that negligence. *See Austin*, 509 U.S. at 614.[10]

Based on that understanding, this Court's cases that have rejected an "innocent owner" defense have been carefully limited to situations where the property has been misused by a third person to whom the property was entrusted. In one of its earliest decisions, involving the cargo of a seized vessel, the Court speaking through Chief Justice Marshall recognized as "unquestionably a correct legal principle" that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364-65 (1808). This Court held in *Peisch* that the owners of the vessel could not be made to suffer for actions taken by the salvors, persons over whom the owners

[10] In *Austin v. United States*, 509 U.S. 602 (1993), the Court reviewed *Calero-Toledo* and earlier *in rem* forfeiture cases and found that they were based on "the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for his negligence," 509 U.S.at 615, and that none of these cases upheld forfeiture "when the owner had done all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 616.

had no control. *Id.* at 364-65. The more recent cases have expressly reserved the question whether the "guilty property" fiction could be employed to forfeit the property of a truly innocent owner. *Austin*, 509 U.S. at 614-15; *Goldsmith-Grant Co.*, 254 U.S. at 512. In *Calero-Toledo*, 416 U.S. 663, the Court explained this reservation by noting that forfeiture of a truly innocent owner's property would raise "serious constitutional questions." Drawing an analogy to the situation in *Peisch* where the owner of the vessel had no control over the actions of the salvors, Justice Brennan's opinion for the Court explained:

> [T]he same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-690.

The four dissenting justices in *Bennis* would have adopted Justice Brennan's formulation in *Calero-Toledo*, and recognized an "innocent owner" exception for truly blameless individuals who establish that they took all reasonable steps to prevent illegal use of the property. *Bennis*, 516 U.S. at 466-67 (Stevens, Souter, Breyer, JJ. dissenting); *id.* at 472-73 (Kennedy, J., dissenting). To be sure, the majority opinion does not endorse that view but it also does not reject it. It concludes, instead, that the "innocent owner" defense is inapplicable. Each of the three opinions by the five Justices in the majority relied heavily on the particular facts and circumstances of the case, and both singly and

cumulatively they are inconsistent with the expansive reading of the decision urged by petitioners.[11]

Chief Justice Rehnquist's opinion for the Court acknowledged that the argument that the forfeiture of the property of innocent owners is unfair "has considerable appeal." *Id.* at 453.[12] However, the "force" of this claim of unfairness was "reduced" in the *Bennis* case because of a number of factors. *Id.* First, in *Bennis* the automobile "was used in criminal activity" by its joint owner, the husband. *Id.* This placed the case within "a long and unbroken line of cases [which] hold that an owner's interest in property may be forfeited *by reason of the use to which the property is put* even though the owner did not know that it was to be put to such use." *Id.* at 446. (emphasis added).[13]

Furthermore, both Justice Rehnquist and Justice Ginsburg stressed that the car could be forfeited to the state because the husband was the joint owner, and thus the innocent spouse's claim was solely for an offset interest in the proceeds. *Id.* at 453, 457 (Ginsburg, J. concurring). In fact, as Justices Rehnquist, Thomas and Ginsburg all noted, the proceeds from the sale of the car (purchased for $600) did

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[11] The narrowness of the *Bennis* decision has been noted in both the leading treatises in the field. David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, vol. 1, §12.04, pp.12-62 (Matthew Bender 1998)("The Court's opinion, per Chief Justice Rehnquist, should be read as resting on narrow grounds peculiar to the *Bennis* case . . . . Thus, this decision is not going to be the Court's final word on the subject"); Steven L. Kessler, CIVIL AND CRIMINAL FORFEITURE, vol.1, §3.01[3][a], pp.3-180 (West Group 1999).

[12] Justice Thomas went further in his concurring opinion by characterizing such a result as "intensely undesirable." 516 U.S. at 454.

[13] In his concurrence, Justice Thomas characterized *Bennis* as a case in which "the property sought to be forfeited has been entrusted by its owner to one who uses it for crime . . . ." 516 U.S. at 456.

not exceed the cost of the sale so there was "practically nothing left" for Ms. Bennis' offset. *Id.* at 445, 456, 458. The Court also stressed that the nuisance proceeding was an equitable action, and that the state courts retained remedial discretion to prevent unjust results, *id.* at 444-45, 453, or, in Justice Ginsburg's words, "to police exorbitant applications of the statute." *Id.* at 457. In exercising that discretion, the state court took special note of the fact that the Bennises had another automobile. *Id.* at 445.

The importance of these particular facts to the result reached by the Court is clear from the emphasis placed on them by all of the Justices in the majority; in fact, Justice Ginsburg made it explicit that these facts were "key to my judgment." *Id.* at 457. Based on these limiting factors, Justice Ginsburg concluded that "Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment." *Id.* at 458 (citation omitted). However, the no-fault eviction policy adopted by petitioners in this case is exactly that -- "an experiment to punish innocent third parties."

Justice Thomas wrote a separate concurring opinion in *Bennis* explaining his own concerns with the law of forfeiture. While acknowledging that the Constitution may permit forfeiture without providing an "innocent owner" defense, he cautioned that such forfeiture must be limited to circumstances in which the property serves as an instrument of the crime.

> The limits on *what* property can be forfeited as a result of what wrongdoing -- for example, what it means to "use" property in crime for purposes of forfeiture law -- are not clear to me. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81, 83, 114 S.Ct. 492, 515, 516, 126 L.Ed.2d 490 (1993) (THOMAS, J., concurring in part and dissenting in part). Those limits whatever they may be, become especially significant when they are the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime. It thus seems appropriate, where a constitutional challenge by an innocent owner is concerned, to apply those limits rather strictly, adhering to historical standards for determining whether specific property is an "instrumentality" of crime. *Cf. J.W. Goldsmith, Jr.,-Grant Co., supra*, at 512, 41 S.Ct., at 191 (describing more extreme hypothetical applications of a forfeiture law and reserving decision on the permissibility of such applications).

516 U.S. at 455 (Thomas, J., concurring).[14]

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[14] In recent years, a majority of the members of this Court has agreed that the concept of an instrumentality subject to forfeiture -- also expressed as the idea of "tainted" items -- must have an outer limit. In *Austin*, the Court rejected the argument that a mobile home and auto body shop where an illegal drug transaction occurred were forfeitable as "instruments" of the drug trade. 509 U.S. at 621. Justice Scalia agreed that a building in which an isolated drug sale happens to take place also cannot be regarded as an instrumentality of that offense. *Id.* at 627-28 (Scalia, J., concurring in part and concurring in judgment). Justice Thomas, too, has stated that it is difficult to see how real property bearing no connection to crime other than serving as the location for a drug transaction is in any way "guilty" of an offense. *See United States v. James Daniel Good Real Property*, 510 U.S. at 81-82 (Thomas, J., concurring in part and dissenting in part).

Austin was decided under the Eighth Amendments Excessive Fines Clause. Although some members of the Court have drawn a distinction between the considerations that are relevant to a claim brought under the Excessive Fines Clause and the Due Process Clause, the principles at is-

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The contrast between the facts of *Bennis* and the instant case is clear. In the instant case, the property in question was not "used in criminal activity;" in fact the illegal activity took place off the premises, and the district court made it clear that its preliminary injunction did not apply if the illegal activity took place inside the apartment. Additionally, respondents have alleged, and petitioners have not contested, that they had neither knowledge of nor control over the illegal activity. The factors present in *Bennis* are thus not at work here. The respondents are blameless and the property was not an instrumentality of the crime.

Additionally, the *prosecutorial* discretion vested in PHAs to decide whether to institute an eviction proceeding is not the same as the equitable *judicial* discretion noted by the Court in *Bennis*. Finally, what is at stake in this case is not a negligible financial interest in a family's second car, but rather their entire property interest in their home. The eviction of these low-income tenants, regardless of their being innocent of any wrongdoing or negligence, is a perfect example of, in Justice Ginsburg's phrase, an "exorbitant application" of a forfeiture statue. 516 U.S. at 457.

None of the Court's decisions upholding forfeiture involve an analogous situation where there is no allegation that any unlawful activity occurred on the leasehold premises. Indeed, there is no allegation that any of the respondents did anything unlawful whatsoever. The forfeiture cases cited by petitioners do not allow the government to impute knowledge or responsibility to the respondents based on the unlawful activities of their children and grandchil-

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[14] (...continued)
sue are plainly related. Both constitutional clauses are designed to cabin the authority of government officials to seize private property which is not fairly characterized as an instrumentality of a crime, or where the owner is strictly blameless.

dren, especially when those activities did not even occur on the property at issue.

Finally, petitioners are no more free to enforce a lease condition that violates substantive due process than they would be free to violate respondents' rights directly. *Amici* recognize that most of this Court's unconstitutional condition cases have involved free speech claims. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958); *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). But the government itself has recently acknowledged that the doctrine is not limited to that context. *See United States v. Knights*, No. 00-1260, slip op. at 5 n.4 (Dec. 10, 2001).

More significantly, the action challenged here violates the principles involved in the unconstitutional conditions cases in a way that may be different in kind but no less damaging in impact. The imposition of a no-fault standard elevates form over substance by sidestepping the substantial protections of the Fifth and Fourteenth Amendments. In particular, the leasehold is conditional on respondents' acceptance of lease terms that erase the requirement of individual guilt, although that requirement is fundamental to the validity of government-imposed deprivations under the Due Process Clause. That result is unconstitutional whether the government accomplishes it directly, through forfeiture, or indirectly, as here, by including it as a condition of the tenancy.

II. PETITIONERS' NO-FAULT EVICTION POLICY IS NOT PROPERLY SUBJECT TO MINIMUM SCRUTINY, WHICH IT CANNOT SURVIVE IN ANY EVENT

Petitioners do not seriously contend that their challenged policy can survive any form of meaningful scrutiny under the Constitution. Instead, they argue that government

decisions about the allocation of scarce benefits are entitled to deference, and that those cases applying a deferential standard of review, primarily in the welfare context, are controlling here. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970).[15] Petitioners' contention might have more force under existing law if respondents were arguing that there is a constitutional right to public housing. *Cf. Lindsey v. Normet*, 405 U.S. 56 (1972). But that is not the argument that is being made. Respondents are not asserting a claim to scarce benefits that have in fact been allotted to somebody else. They are challenging the government's authority to evict them from their homes absent any evidence of personal wrongdoing or misuse of the property. That is not a quarrel about resources. It is a dispute over the government's obligation to act on the basis of individual guilt and accountability -- a principle that this Court has described, in other contexts, as fundamental to our conception of justice. *See* pp.6-7, *supra*. Our conception of justice also demands that intrusions on fundamental rights be subject to more than the cursory review that respondents allege is appropriate here. At this Court has noted, the substantive component of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and interests." *Washington v. Glucksberg*, 521 U.S. at 720.

On that basis, this case is easily distinguishable from *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), and *Lyng v. United Auto Workers*, 485 U.S. 360 (1988), two deference cases that petitioners cite. As a threshold matter, neither *Lyng* nor *Hodory* involved the termination or denial of government benefits based on the conduct of the recipient's children or grandchildren. Additionally, neither case involved the loss of the family domicile. Moreover, none of the government interests at stake in *Hodory* and *Lyng* are present in this case. For instance, *Lyng* stands for the proposition that the Federal Food Stamp program need not increase benefits to supplement the loss of income of the head of the household who decides to go on strike. Applying minimal scrutiny under the Equal Protection Clause, the Court upheld the distinction between persons who go out on strike voluntarily and those who lose their jobs involuntarily. In the Court's view, it was not unlike the decision by most state agencies to deny unemployment benefits to those who quit their jobs voluntarily or are fired for cause. In addition, there was at least an element of personal accountability in *Lyng* that is totally missing here. While the striker's family would undoubtedly suffer from his decision, the striker controls the destiny of his own family. Finally, unlike *Lyng*, the respondents in this case are not asking the government to subsidize the exercise of their constitutional rights, they are merely asking the government to refrain from abridging them.

The essential facts in *Hodory* are different from *Lyng* only to the extent that the unemployment statute in *Hodory* did not draw any distinction between individuals who voluntarily went out on strike and those who were temporarily furloughed because of a plant closing. In this sense, the furloughed worker in *Hodory* was blameless. Any similarity between *Hodory* and this case ends there, however. As in *Lyng*, there was no property interest at stake. Furthermore, the steelworker plaintiff in *Hodory* was laid off as a result of a strike at one of the employer's coal mines. Under these circumstances, the Court reasoned that the denial of benefits was rationally related to the goal of maintaining governmental neutrality in labor disputes. The Court recognized that "[t]he employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way

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[15] Petitioners make this argument primarily by reference to Judge Sneed's dissent from the *en banc* decision below.

for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike." *Hodory*, 431 U.S. at 492. Because the distinction in *Hodory* did not involve a suspect class, the denial of benefits was upheld. But being denied benefits under the circumstances present in *Hodory* is very different from being turned out of your home when an individual possesses a lease agreement. Respondents' complaint in this case has less to do with disparate treatment than with treatment that is fundamentally unfair. Thus, there is no occasion to apply rational basis analysis or to dispense with the due process analysis we have argued throughout.

Even if the Court's equal protection or due process decisions involving economic regulation are applicable, the interests identified by the petitioners and referenced by the dissent in the *en banc* decision below are not advanced by the no-fault eviction policy. The policy is premised on the empowerment of public housing residents to assist in the fight against crime and violence. It is the intent of housing officials that the policy will "provide a credible deterrent against criminal activity and facilitate the eviction of truly culpable tenants." *Rucker*, 237 F.3d at 1139-40. It is also hypothesized that the policy will "create incentives for all tenants to report drug related activity." *Id.* The court of appeals rejected this far reaching argument for the very basic reason that "[I]mposing the threat of eviction on an innocent tenant who has already taken all reasonable steps to prevent third-party drug activity could not have a deterrent effect because the tenant would have already done all that tenant could do to prevent the third-party drug activity." *Id.* at 1121. Likewise, when applied against elderly, low-income residents for the conduct of their adult children and grandchildren, there is no basis to conclude that the government's

interests will be rationally advanced.[16] The individuals evicted are innocent of any wrongdoing and culpable of nothing. "Evicting the innocent tenant will not significantly reduce drug-related criminal activity in public housing, since the tenant has not engaged in any such activity personally or knowingly allowed such activity to occur." *Id.* All the policy accomplishes is the removal of these otherwise law-abiding individuals. Under this Court's cases requiring personal guilt, the means chosen by the petitioners cannot justify the ends.

The court of appeals' analysis rejecting the interests of petitioners is unquestionably correct. Indeed, this Court's forfeiture decisions can be understood to reach the very same conclusion when applied to the facts of this case. *Austin*, 509 U.S. 602, stands for the proposition that forfeiture of property that is not an instrumentality of the crime does not rationally advance the government's interest in deterring misuse of the property. The government's rationale is even more attenuated here because there is no allegation of misuse. Moreover, if *Bennis*, 516 U.S. 442, is understood as a case involving ownership or negligent entrustment

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[16] Admittedly, the policy might have some rational basis if it were targeted at the children and grandchildren who are allegedly engaged illegal activity, but this cannot provide the justification for evicting the parents or grandparents -- especially where as here the conduct did not occur in the leasehold premises and was beyond the power of leaseholder to prevent or control. What makes petitioners' position so untenable is that if they are aware of illegal activity by the leaseholder or of illegal activity occurring on the leaseholder's premises, they have abundant authority under the policy to evict the tenant on this basis. Similarly, if petitioners are aware that the leaseholder's children, grandchildren or other household members or guests are engaging in illegal activity on or off the premises, they can intercede or seek the assistance of local law enforcement authorities. Petitioners' enforcement of the no-fault policy would allow irrational evictions of innocent tenants.

of the car, and not as a case categorically rejecting an innocent owner defense where the property owner is strictly blameless, then the government's interests in deterring or punishing drug use by the tenant or tenant's household members are not rationally advanced, just as they wouldn't be rationally advanced if the government forfeited the property of individuals who could not foresee or control the misuse of their property. Under these circumstances, it is "difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Calero-Toledo*, 416 U.S. at 689-90.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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NOS. 00-1770 AND 00-1781

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

V.

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V.

PEARLIE RUCKER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* PENNSYLVANIA ASSOCIATION OF RESIDENT COUNCILS, RESIDENT ADVISORY BOARD TO THE ALLEGHENY COUNTY HOUSING AUTHORITY, ERIE TENANTS COUNCIL, AND HAZELTON ALLIANCE OF RESIDENT COUNCILS, IN SUPPORT OF RESPONDENTS PEARLIE RUCKER, ET AL.

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2. To the extent that HUD's interpretations would prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable

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a.) To the extent that HUD's interpretations would prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, they do not constitute an exercise of Congressionally-delegated authority, and thus do not merit *Chevron* deference. 19

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NOS. 00-1770 AND 00-1781

IN THE SUPREME COURT OF THE UNITED STATES

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Statement of Interest of *Amici Curiae*[1]

Amici curiae are a statewide association of public housing resident councils, one local association of resident councils, one local resident council, and one local resident advisory board. Each represents the interest of persons who are subject to so-cailed One-Strike[2] eviction policies in their respective communities. By application of these policies over the last six years, public housing agencies in Pennsylvania have attempted to strip low-income persons of essential housing benefits without regard to whether the affected persons were themselves culpable of any crime. See, e.g., *Allegheny County Housing Authority v. Hibbler*, 748 A.2d 786 (Pa.Cmwlth. 2000), *allocatur denied*, 759 A.2d 924 (Pa. 2000). Each of the *Amici* respectfully submits that this Court should maintain and enforce clear and long-standing Congressional policies that protect innocent law-abiding tenants from arbitrary termination of their housing assistance.

The Pennsylvania Association of Resident Councils provides statewide technical support and training to 350 local resident councils. These local resident councils in turn represent the interests of approximately 80,000 public housing tenants in Pennsylvania. The Hazelton Alliance of Resident Councils is a local umbrella organization of resident councils representing federally-assisted housing developments in the Hazelton area. The Erie Tenants Council is a nonprofit advocacy group which represents the political, social, and economic rights of approximately 1,800 families residing in public housing in the city of Erie, PA. The Resident Advisory

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[1] *Amici Curiae* have obtained the written consent of Petitioners United States Department of Urban Development (HUD), Oakland Housing Authority (OHA), and Harold Davis, as well as the written consent of Respondents Pearlie Rucker, et al. to file this brief with the Court. Pursuant to Supreme Court Rule 37(6), *Amici Curiae* note that counsel for *Amici* wrote the entirety of this brief and that no person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] See, HUD Notice PIH 96-16, "One Strike and You're Out of Public Housing" (April 12, 1996), at 6.

Board to the Allegheny County Housing Authority has been established pursuant to federal law to "adequately reflect and represent the residents" assisted by the Allegheny County Housing Authority (ACHA), in order to "assist and make recommendations [to ACHA] regarding the development of [ACHA's] public housing agency plan . . . ." See, generally, 42 U.S.C. § 1437c-1(e). Among the various policies included in ACHA's agency plan are occupancy and termination standards for the 2,490 families currently receiving assistance from ACHA.

Summary of Argument

Barely six months ago, this Court held that agency interpretations purporting to resolve statutory ambiguity may avail themselves of one of two deference standards, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Agency interpretations seeking *Chevron* deference must satisfy two showings: First, that Congress delegated authority to the agency to make law, and second, that the interpretation at issue is the product of the agency's law-making authority. *U.S. v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001).

Petitioner HUD has promulgated several regulations in implementation of 42 U.S.C. § 1437d(*l*)(6), but none that squarely address two questions: (1) whether, in enacting § 1437d(*l*)(6), Congress intended to foreclose judicial review of adverse PHA decisionmaking, and (2) whether Congress intended to abrogate a tenant's state-law affirmative and equitable defenses. Instead of resolving these matters through notice and comment rulemaking, HUD has reverted to announcing its interpretations on an ad hoc basis (at oral argument before the Court of Appeals) and by means other than formal codification (in preambles to two final rules).

Such announcements by HUD are no substitute for formal notice and comment rulemaking, and in fact pervert that process. Such announcements, moreover, are not entitled to *Chevron*

deference, because they do not represent an actual exercise of Congressionally-delegated authority.

This Court and Congress both recognize that proper notice to affected parties is an essential requirement of the law. Were an agency permitted to circumvent the rigors of the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq*, the goal of effective notice would be frustrated. Furthermore, enforcement of improperly promulgated legal standards raises the specter of arbitrary enforcement of the law, a concept wholly offensive to our nation's values. Not only has HUD failed to formally codify its positions regarding the above issues, but it has also failed to adopt an unequivocal position regarding several related concerns.

In 1991, HUD published its first final rule interpreting §1437d(*l*)(6). 56 Fed. Reg. 51560 (October 11, 1991). None of the regulations published within that rule directly answered either of the two matters identified above. Although HUD raised, in the preamble, the issue of contractual responsibility for crimes that the tenant had no knowledge of, it never resolved that issue with regard to judicial review or tenant defenses. Further along in the preamble HUD discussed the PHA's power to forbear, based on its weighing of mitigating circumstances, but again did not address whether and to what extent such power might affect the issues of judicial review and tenant defenses. Significantly, in the same publication HUD asserted that no part of the rule preempted state law, and recognized as well the role that eviction courts play in crime-based terminations of housing assistance.

Approximately eight years after the 1991 article, HUD announced its only unequivocal interpretation regarding judicial review, *viz.*, that eviction courts could not, consistent with § 1437d(*l*)(6), review a PHA's decision for abuse of discretion. The announcement came at oral argument before the Court of Appeals, at which time HUD also suggested that Congress had abrogated the tenant's state law defenses. See, 237 F.3d 1113, 1123, n. 3 (9th Cir. 2001)(Opinion below). Then, in May of this year, HUD issued a second set of regulations construing § 1437d(*l*)(6). 66 Fed. Reg. 28776 (May 24, 2001). In the preamble to that final rule, HUD

reiterated that eviction courts did not have the power to weigh mitigating circumstances, and that such power was only properly exercised by PHAs. But as was the case with the 1991 rule, the 2001 rule did not codify HUD's positions regarding judicial review and tenant defenses, and furthermore denied that HUD's interpretations had preempted state law.

With the exception of whether a reviewing court may substitute its judgment for the discretion, or lack thereof, exercised by a PHA, HUD's interpretations have failed to resolve any ambiguity under the statute. Although HUD asserted before the Court of Appeals that § 1437d(*l*)(6) precluded eviction courts from reviewing a PHA's decision to sue, it merely implied that the same provision precluded the consideration of affirmative defenses. Moreover, in its preambular discussions HUD staked out only one unequivocal position, that courts may not weigh mitigating circumstances in evaluating the propriety of a PHA's decision to sue. And HUD has never codified in formal regulations, pursuant to notice and comment, its views regarding any of these issues. As a result, HUD has failed to exercise the Congressionally delegated authority to make law. *See, Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994)(resolution of statutory ambiguities is the "very purpose behind the delegation of lawmaking power to administrative agencies.")(Thomas, J., dissenting)(citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). Consequently, HUD's interpretations are not entitled to *Chevron* deference.

Because this Court has previously refused to defer to agency positions advanced by appellate counsel, rather than by the agency itself, HUD's unequivocal assertion before the Court of Appeals does not alter this analysis. *See, Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988)(citing, *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971)); see also, *Mead*, 121 S.Ct. at 2177, n.19 (declining to extend *Chevron* deference to agency's brief). Furthermore, there is no reason to believe that Congress delegated authority to HUD to announce the abrogation of state law defenses and judicial review. The text of § 1437d(*l*)(6) is absolutely silent and HUD has admitted that its interpretations have

no preemptive effect. Finally, as a matter of policy this Court should not reward HUD for failing to legislate by appropriate means its interpretations regarding judicial review and tenant defenses. HUD clearly had reason to know the significance of these matters, as they had been determinative in several reported decisions prior to HUD's most recent 2001 rule. *See, e.g., Charlotte Housing Authority v. Patterson*, 120 N.C.App. 552, 557-58, 464 S.E. 2d 68 (N.C. App. 1995)(United States Housing Act prohibits imposition of strict liability; eviction of innocent tenants would "shock court's sense of fairness"); *Allegheny County Housing Authority v. Hibbler*, 748 A.2d 786 (Pa.Cmwlth. 2000), *allocatur denied*, 759 A.2d 924 (Pa. 2000)(PHAs must consider mitigating factors in public housing drug evictions; trial court properly credited tenant's claims of innocence in defense to eviction action). *See, generally, Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 110 (1995)(O'Connor, J., dissenting)(where ambiguity foreseeable, agency should not be permitted to circumvent notice and comment procedures by resolving ambiguity in less formal interpretive guide).

Furthermore, because according *Chevron* deference to HUD's interpretations would frustrate the interests which that doctrine is intended to advance, deference is not appropriate in this case. Broadly speaking, in according deference to legislative rulemaking by agencies, *Chevron* serves three purposes (1) vesting policy making in federal agencies accountable to the President 467 U.S. at 864-865, (2) vesting policy making in agencies whose expertise exceeds that of the judiciary 467 U.S. at 865, and (3) promoting uniformity of results. *See, Mead*, 121 S.Ct. at 2175 (declining to extend *Chevron* deference)("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting"). Deference in these circumstances would fail to serve the first purpose, because HUD's rulemaking does not purport to represent a policy choice by HUD, and further, because the ultimate decisionmaker in disputes arising under § 1437d(*l*)(6) is a local state-commissioned PHA, and not a federal agency accountable to the President. Furthermore, no agency expertise is required to answer the

question of whether indigent persons have a right, under §1437d(*l*)(6), to judicial review of PHA decisionmaking, or to defend against the PHA's lawsuit for possession. Finally, by proposing that the various local PHAs should decide, on a case-by-case basis, whether and to what extent to permit tenants to assert the defense of innocence and other mitigating circumstances, HUD necessarily promotes a non-uniform regime.

The final inquiry for deference purposes is set forth in *Skidmore*, and requires a weighing of five factors: (1) the thoroughness of the agency's consideration, (2) the validity of the agency's reasoning; (3) the degree of agency expertise evident in the interpretation; (4) the consistency of the interpretation in light of the agency's earlier and later pronouncements; and (5) all other factors bearing on the persuasiveness of the interpretation. *Mead*, 121 S.Ct. at 2172 (quoting *Skidmore*, *supra*); 121 S.Ct. at 2175 (interpretation has colorable claim to *Skidmore* deference where regulatory scheme highly detailed and agency can bring specialized experience to bear).

HUD's interpretations fail in all five respects. First, HUD's assertion that Congress abrogated the right to any judicial review of PHA decisionmaking, as well as the tenant's affirmative and equitable defenses, arose in an adversarial proceeding before the Court of Appeals. Such reasoning cannot constitute an agency's "fair and considered" judgment. Second, HUD's interpretations reveal several significant lapses in the agency's reasoning, including (1) that its interpretations barring state courts from weighing mitigating circumstances does not constitute a preemption of state law; (2) that partial eviction remedies are consistent with the general deterrent purpose of § 1437d(*l*)(6); (3) that tenants will be encouraged to disclose the commission of crime by family members even though such disclosure subjects the reporting tenant to eviction; (4) that mitigating circumstances are relevant, even though HUD's interpretation would permit the rejection of mitigating circumstances in every case. Third, and as previously mentioned, no agency expertise is necessary for answering the question of whether tenants should have a meaningful right to judicial review of adverse agency action, or the right to raise affirmative and equitable defenses to an

eviction action. Fourth, HUD's interpretations at the Court of Appeals conflict with its assertion of no preemptive effect in the 1991 and 2001 final rules. Fifth, HUD's interpretations are unpersuasive because they encourage arbitrary terminations of housing assistance, in contravention of the decades-long recognition of Congress and the courts that essential housing benefits should not be terminated in the absence of evidence that the tenant herself is guilty of serious misconduct.

Because HUD's interpretations are entitled to no deference, the construction of § 1437d(*l*)(6) urged by the respondents should control. According to that construction, Congress has clearly prohibited the termination of public housing assistance for criminal activity that the tenant neither knew of nor had reason to know. Consequently, Congress did not intend to abrogate the tenant's affirmative and equitable defenses, nor the tenant's right to judicial review of adverse PHA decisionmaking, as these are plainly necessary to protect the tenant from an erroneous and unwarranted decision to terminate assistance.

Argument

I. Introduction

Barely six months ago, this Court clarified the standards which govern disputes over agency interpretations of law. In *U.S. v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001), the Court held that agency interpretations purporting to resolve statutory ambiguity may avail themselves of one of two deference standards, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). To merit deference under *Chevron*, however, the agency interpretation must satisfy two prerequisites: First, a showing that Congress has delegated authority to the agency to issue interpretations with the force of law, and second, a showing that the interpretation is the product of the agency's deliberate exercise of such authority. *Mead*, 121 S.Ct. at 2171 (2001).

Today, HUD petitions this Court to disavow the clarification only recently articulated in *Mead*. At issue are two HUD interpretations regarding the statutory standard for termination of a public housing tenancy. The interpretations, that tenants have no right to judicial review of adverse agency decisionmaking, and may not raise an affirmative or equitable defense to a lease termination action predicated on crime, have never been formally codified. Instead, these interpretations have only arisen intermittently, in preambular language to HUD's final rules, and in argument before the Court of Appeals. Clearly, these interpretations do not represent an actual exercise of law-making authority. Yet HUD asks the Court to bestow *Chevron* deference upon them. As explained below, there is no proper or compelling basis for doing so. In addition, because extending *Chevron* deference to these interpretations would not serve the interests upon which the *Chevron* doctrine is founded, such deference would be inappropriate. Finally, because the interpretations do not pass muster under the less deferential standard of *Skidmore*, they are entitled to no deference at all.

Amici hereby adopt by reference the arguments advanced by respondents, which demonstrate that Congress clearly prohibits the

termination of a public housing tenancy on the basis of criminal activity that the tenant neither knew of nor had reason to know. However, in this brief, *Amici* will present an argument in the alternative: assuming that Congress' intent is less than clear, the HUD interpretations before the Court are entitled to no deference. As a result, resolution of the questions presented will require an inquiry into the overall purposes of the United States Housing Act, 42 U.S.C. §§ 1437 *et seq.*, as ably recited in the briefs of the respondents and various *amici* in support thereof. *Amici* submit that such an approach leads inevitably to the conclusion that need-based benefits such as public housing assistance may not be terminated for crimes which the recipients neither knew of nor could have foreseen.[3] The judgment of the Court of Appeals should therefore be affirmed.

II. Congress did not intend to abrogate the right to judicial review of adverse PHA decisionmaking, nor the right to raise affirmative and equitable defenses under state law.

A. HUD's non-codified interpretations asserting that public housing tenants have no right to judicial review of adverse PHA decisionmaking, and no right to raise affirmative or equitable defenses in an eviction lawsuit brought on the basis of criminal activity, are entitled to no deference.

Notice to affected parties, through formal rulemaking or adjudicatory procedures, is recognized as an essential component of administrative law. Both the Administrative Procedure Act (APA)

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[3] *Amici* hereby adopt by reference the arguments advanced in the Respondents' brief, as well as the arguments advanced in the briefs filed on behalf of *Amicus Curiae* American Civil Liberties Union of Northern California, and *Amici Curiae* AARP, et al.

5 U.S.C. §§ 500 *et seq.* and the *Chevron* canon contemplate that resolution of statutory ambiguities should generally be achieved through formal procedures such as notice and comment rulemaking or adjudication. *Mead*, 121 S.Ct. at 2173 ("overwhelming" number of instances applying *Chevron* deference to interpretations promulgated pursuant to formal rulemaking or adjudication); H.R.Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946)(purpose of APA is "To provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice."); S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)("notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."). Were an agency permitted to bypass these formal procedures, the goals of the APA, as well as the rationales underlying *Chevron*, would plainly be frustrated. *See, Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 110 (1995)(O'Connor, J., dissenting)(where ambiguity foreseeable, agency should not be permitted to circumvent notice and comment procedures by resolving ambiguity in less formal interpretive guide).[4] Thus, this Court recently refused to apply *Chevron* deference to an agency's non-formal interpretation premised upon statutory ambiguity. *Mead*, 121 S.Ct. at 2171 (non-formal interpretative rule

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[4]In her dissent in *Guernsey*, Justice O'Connor identified the potential for abuse where deference is accorded an agency's informal interpretation which, the agency asserts, resolves an ambiguity in its own regulations:

> I find it significant that the bond defeasement situation at issue here *was* foreseen. If the secretary had the opportunity to include a section on advanced refunding costs in the [manual], then she could have promulgated a regulation to that effect in compliance with the Administrative Procedure Act, thereby giving the public a valuable opportunity to comment on the regulation's wisdom and those adversely affected the chance to challenge the ultimate rule in court. An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation.

(Emphasis in original). 514 U.S. at 110-111.

only entitled to *Skidmore* deference).[5]

The Court's concern with proper and effective notice of agency rulemaking reflects a larger interest in preventing arbitrary enforcement of the law. See, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994)(Thomas, J., dissenting)("an agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy.")(quoting, K. Davis & R. Pierce, Administrative Law § 11.5, p. 204 (3d ed. 1994)). The evils inherent in such practices have long been apparent to this Court. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)("A vague law impermissibly delegates policy matters . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.")(footnotes omitted); *Cole v. Young*, 351 U.S. 536, 556 (1956)(ambiguities in Executive Order construed against government where termination of employment premised on national security).

In its argument before the Court of Appeals, Petitioner HUD announced two interpretations of 42 U.S.C. §1437d(*l*)(6) which HUD has never codified, much less enunciated in unequivocal terms in any preamble to a proposed or final rule. Assuming *arguendo* that HUD's

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[5]In *Mead*, the Court observed that it had previously applied *Chevron* deference to an agency's interpretation promulgated beyond the bounds of formal rulemaking or adjudication. *Mead*, 121 S.Ct. at 2173, n. 13 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995). *NationsBank* is easily distinguished from this case. In *NationsBank*, the Court explained that deference was warranted because Congress had delegated enforcement powers to the agency (to superintend the business of banking) in order to effectuate the goals of a regulatory statute (National Bank Act, Rev.Stat. §§ 5136, as amended, 12 U.S.C. § 24 Seventh (1988 ed. and Supp. V)). *Id.* ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.")(citing, *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 403-04 (1987)). Because this dispute does not present issues of regulatory enforcement, *NationsBank* is inapplicable.

interpretations are predicated upon actual statutory ambiguity, *Amici* submit that they are not entitled to *Chevron* deference, because they do not represent an actual exercise of Congressionally delegated authority. *Mead, supra.* Further, *Chevron* deference is not appropriate where, as here, such deference would undermine the three interests which the doctrine is intended to advance. Finally, and notwithstanding their colorable claim to *Skidmore* deference, the interpretations have no power to persuade, and thus are not entitled to any deference.

1. Since 1991, HUD's interpretations regarding judicial review and tenant defenses have been informal and largely equivocal.

Congress first enacted the tenancy termination standard appearing at 42 U.S.C. § 1437d(*l*)(6) in 1988.[6] That standard, which creates a cause of action for termination of tenancy, has remained essentially unchanged in the ensuing thirteen years. In its current form, the standard requires PHAs to use leases which:

> provide that any . . . drug-related criminal activity on or off [public housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, *shall be cause for termination of tenancy.*

As HUD concedes, Congress has never intended that this provision be read to *require* eviction.[7] On the contrary, by employing the phrase *cause for termination of tenancy*, Congress has simply

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[6]This provision was originally codified at 42 U.S.C. §1437d(*l*)(5), and renumbered in 1998 as subsection (*l*)(6). See, Historical and Statutory Notes, 42 U.S.C. §1437d (1994 & Supp. V 2000).

[7]HUD Brief at 21 ("HUD has consistently made clear that '[t]he fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it.").

defined a cause of action. Whether a PHA might ultimately sue on that cause of action, or what defenses a tenant might raise in opposition, are by definition beyond the scope of this provision.

In 1991, HUD published a final rule which announced four separate interpretations of § 1437d(*l*)(6). Three appeared as formal regulations, while the fourth was included in the preamble to the final rule. Of the three regulations, one essentially parroted the language of the statute (24 C.F.R. § 966.4(l)(2), 56 Fed. Reg. 51560, 51578 (1991)), one obligated the tenant to assure that neither the tenant, household member, guest, or other person under the tenant's control would commit drug-related criminal activity (24 C.F.R. § 966.4(f)(12), 56 Fed. Reg. at 51577), and one authorized PHAs to consider mitigating circumstances when deciding whether to sue or forbear (24 C.F.R. § 966.4(l)(5), 56 Fed. Reg. at 51578).

HUD's fourth interpretation, in contrast, responded to commentary addressing, *inter alia*, the proposed assurance requirement (§ 966.4(f)(12)), as well as the possible imposition of liability for criminal acts that the tenant did not know of or have reason to foresee, or in which the tenant did not participate or acquiesce, or which were committed by persons beyond the tenant's control, or which occurred despite the tenant's preventive efforts. In response to those comments, HUD stated:

> There is no reason of Constitutional necessity or public policy for HUD to impose—as proposed by comment—any additional restriction on when the tenancy *may be terminated* for criminal activity by a household member. . .
>
> The tenant *should not* be excused from contractual responsibility by arguing that tenant [sic] did not know, could not foresee, or could not control behavior by other occupants of the unit.

56 Fed. Reg. at 51567. (Emphasis added). At the outset, it is noteworthy that in this excerpt HUD recognized that, to the extent the fourth interpretation represented a policy choice, the choice was

Congress' alone. ("The legislative determination by the Congress rests on a reasonable judgment that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general . . ." *Id.*). Further, because HUD's interpretation employed precatory language, it clearly recognized the ambiguities which the statute left unresolved, including the appropriateness or desirability of eviction in any particular set of circumstances.

That said, the excerpt raised at least as many questions as it answered. For example, despite the lack of any explicit language in the statute abrogating state-created affirmative and equitable defenses,[8] the excerpt suggested that Congress had done precisely that. Such an assertion, however, would plainly conflict with HUD's assertion at the end of the preamble that none of its interpretations preempted state law.[9] Finally, the excerpt did not expressly limit the

[8] Pennsylvania law recognizes the equitable doctrine of anti-forfeiture, as well as affirmative defenses to lease termination. *See, Cimina v. Bronich*, 503 A.2d 427, 429 (Pa. Super. 1985)(courts will not impose forfeiture in absence of showing that breach was material; tenant's innocence is one of five factors used to determine materiality of breach), *rev'd on other grounds*, 537 A.2d 1355 (Pa. 1988); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979)(breach of implied warranty of habitability as defense to termination for rental default). Since its inception, the United States Housing Act of 1937 has explicitly recognized and preserved "the civil rights under the State or local law of the inhabitants on such property." Pub. L. No. 75-412, § 13(b), 50 Stat. 888, 895, 42 U.S.C. §§ 1437 *et seq*. HUD, moreover, has long recognized that public housing tenancies are defined by state law. *See*, Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988)("[T]he procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.").

[9] *See*, 56 Fed. Reg. at 51,575 ("The General Counsel, as the Designated Official under Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States. . ."); *see also* Exec. Order No. 12,612, 52 Fed. Reg. 41685, § 4(a) (October 26, 1987) ("Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute."), *revoked by* Exec. Order No. 13,083, 63 Fed. Reg. 27,615 (May 14, 1998).

scope of review of the eviction court,[10] particularly regarding whether a court might review adverse PHA decisionmaking for abuse of discretion.

Two subsections later, HUD turned to the issue of PHA discretion, and specifically, the final regulation which recognized the authority of PHAs to forbear on the basis of mitigating circumstances. In introducing this regulation, HUD noted, "[T]he decision when and whether to evict is a discretionary management judgment by the individual PHA. The decision is and should be made by the PHA. . ." 56 Fed. Reg. at 51567. Having said that, HUD never hinted at the reality that would confront a tenant who wished to place mitigating evidence before the agency, given that the regulations provided no procedures for doing so.[11]

Finally, several sections later in the article, HUD recognized the role of the eviction court, ". . .[T]he tenant must have a right, pursuant to [the] law of the jurisdiction, to a decision based on the evidence and the law. . ." *Id.* at 51574. But just as was the case earlier in the article, HUD did not mention the power of a court to hear a tenant's challenges to adverse PHA decisionmaking.

Eventually, HUD would speak directly to these issues, albeit

[10] HUD's respect for the distinction between the concepts of *eviction* and *termination of tenancy* appears to vary depending upon the context. For example, when addressing the issue of court adjudication, HUD nominally acknowledges that PHAs do not have unilateral power to evict. *See*, 56 Fed. Reg. at 51578 ("The PHA may evict the tenant from the unit only by bringing a court action."), 24 C.F.R. § 966.4(l)(4)), *and*, 56 Fed. Reg. 51568 ("By law, a PHA may terminate a public housing lease for 'other good cause' . . ."). Elsewhere in the preamble, however, when discussing PHA decisionmaking, HUD removes the eviction court from the equation. *See*, 56 Fed. Reg at 51567 (". . . [T]he decision when and whether to evict is a discretionary management judgment by the individual PHA. The decision is and should be made by the PHA. . ."); *Id.* (". . .[A] decision to evict for criminal activity is not automatic but rests in the discretion of the PHA . . .").

[11] Noticeably absent in HUD's brief is any mention of this fact.

eight years later, and apparently only after having been pressed on the matter. According to the Court of Appeals, at oral argument, "HUD took the position . . . that an eviction court could only consider whether or not the lease term was violated, and could not review the PHAs' [sic] decision that the violation warranted eviction."[12] 237 F.3d 1113, 1123, n. 3 (9th Cir. 2001)(Opinion below). Thus, almost a decade after the 1991 regulations, HUD announced that in enacting § 1437d(*l*)(6) in 1988, Congress had intended to preclude courts from reviewing a PHA's decision to sue, rather than excuse, a tenant. At the same time, HUD suggested that the notion merely hinted at in the 1991 preamble was now the law: that Congress had abrogated state law defenses to the PHA's cause of action in the event of drug-related crime. In other words, *only* the PHA, and not an eviction court, had the power to credit a tenant's defenses; further, *only* the PHA had the authority to consider mitigating circumstances; and finally, and most importantly for this discussion, *no* court could entertain, much less evaluate, a claim that the PHA had committed an abuse of discretion in deciding to sue.

In May of this year, HUD issued its most recent final rule construing § 1437d(*l*)(6). In the preamble, HUD responded to a comment urging that the final rule should encourage courts to "consider all circumstances" and "exercise discretion in a humane manner" when evicting a tenant for another person's criminal activity. HUD began its response by noting that elsewhere in the preamble it had recognized a PHA's flexibility (i.e., discretion) to consider mitigating circumstances. HUD then stated:

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[12]Even this assertion begs the question. In Pennsylvania, eviction lawsuits and appeals from adverse agency decisions are docketed separately, and there is no guarantee that one court will hear both. *See*, 68 P.S. § 250.502(a)(suit to recover possession initiated in justice of the peace court) and 42 Pa.C.S.A. § 932 (Court of Common Pleas' jurisdiction over appeals from minor judiciary) and 42 Pa.C.S.A. § 933(a)(2)(Court of Common Pleas' jurisdiction over appeals from local agencies). Thus, the assertion that an eviction court may not review an adverse agency decision does not answer the question of whether another court could.

> The statute does not authorize courts to exercise this same type of discretion. Courts determine whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction of the persons whom the PHA seeks to evict.

66 Fed. Reg. at 28782 (May 24, 2001).[13]

As in the 1991 excerpt discussing the grounds for termination of tenancy, HUD once again attributes the policy choices embodied in the excerpt to Congress, rather than to itself. As for resolving any ambiguity in the statute, however, this excerpt actually perpetuates several. Regarding discretion, HUD asserts that courts lack the authority to weigh the mitigating circumstances relevant to the PHA's decision to sue or forbear. As in the 1991 preamble, however, this claim has no explicit support in the statute's text, and furthermore conflicts with the preamble's assertion that the interpretations within did not preempt state law. 66 Fed. Reg. 28776, 28791 (May 24, 2001)("This final rule does not . . . preempt State law within the meaning of Executive Order 13132."). Moreover, while the excerpt purports to prohibit a court from weighing mitigating circumstances (and substituting its decision for that of the agency), it does not appear to preclude a court from vacating a PHA's decision for failure to consider one or more mitigating circumstances. See, *Motor Vehicles Mfgrs. Assoc. v. State Farm*, 463 U.S. 29, 44 (1983)(agency's failure to consider important issue normally constitutes abuse of discretion). Furthermore, and in stark contrast to the position which HUD advanced before the Court of Appeals, the

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[13]In all, the 2001 preamble contains three references to the limitation on the right of judicial review. *See, also*, 66 Fed.Reg. at 28782 (". . . [A] court's function under HUD's regulations is to determine whether an eviction meets the requirements of the lease and of Section 6(l)(6) as they have been interpreted in that jurisdiction, and not whether a PHA has considered additional social and situational factors that HUD's regulations authorize, but do not require a PHA to consider."); 66 Fed.Reg. at 28783 (". . .HUD's conferral of discretion on PHAs in deciding whether to terminate tenancy in each case does not constitute a conferral of discretion on local courts to consider factors other than those appropriate under the lease.")

excerpt fails to explicitly address whether a court may credit the tenant's affirmative and equitable defenses for breach of contract. In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), this Court held that a regulation providing for negotiated compensatory time agreements did not preclude an employer from forcing its employees to retire compensatory time through the employer's mandated schedule. By that reasoning, HUD's assertion disavowing judicial review of PHA decisionmaking cannot be seen as affirmatively precluding an eviction court from considering affirmative and equitable defenses. As of the date of this filing, HUD has yet to publish a regulation asserting that courts may not review adverse PHA decisionmaking, nor credit the tenant's affirmative and equitable defenses. Yet HUD invokes *Chevron* to legitimize the interpretations which thus far have appeared only in regulatory preamble and appellate advocacy. For the reasons stated in the next section, the interpretations which HUD has announced in purported resolution of these issues are due no deference.

2. To the extent that HUD's interpretations would prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, they are entitled to no deference under *Chevron* or *Skidmore*.

Six months ago, this Court clarified the standards of review which govern agency rulemaking predicated upon statutory ambiguity. As stated in *Mead, supra*, such interpretations may merit deference under one of two standards, *Chevron* and *Skidmore*. For deference under *Chevron*, two showings are required: First, that Congress has delegated law-making authority to the agency, and second, that the agency's interpretation is the product of such delegated law-making authority. 121 S.Ct. at 2177. Should the interpretation fail those showings, the agency may yet seek deference under *Skidmore* (*Mead* at 2171 & 2177), in which case the agency has the burden of establishing that the interpretation is persuasive.

Christensen, 529 U.S. at 587 (2000)(rejecting interpretation advanced by agency as unpersuasive).

HUD's interpretations of § 1437d(*l*)(6) are not the product of HUD's law-making authority, and thus are not entitled to deference under *Chevron*. Alternatively, *Chevron* deference is not appropriate where, as here, such deference would undermine the three interests that the doctrine is intended to serve. Finally, because HUD's interpretations are unpersuasive, they are entitled to no deference under the less deferential standard of *Skidmore*.

a.) To the extent that HUD's interpretations would prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, they do not constitute an exercise of Congressionally-delegated authority, and thus do not merit *Chevron* deference.

As identified in the preceding section of this brief, HUD's interpretations have, with one exception, failed to resolve any ambiguity under the statute. Although HUD asserted before the Court of Appeals that § 1437d(*l*)(6) precluded eviction courts from reviewing a PHA's decision to sue, it merely implied that the same provision precluded the consideration of affirmative defenses. Moreover, in its preambular discussions HUD staked out only one unequivocal position, *viz.*, that courts may not weigh mitigating circumstances in evaluating the propriety of a PHA's decision to sue.[14] As to each of the other issues discussed in the preceding section of this brief, however, HUD has never published, adopted, or even articulated a clear policy. And HUD has never codified in formal regulations, pursuant to notice and comment, its views regarding any of these issues. As a result, HUD has failed to exercise

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[14]As previously mentioned, HUD did not use the occasion to clarify whether it believed that the statute precluded a court from vacating a PHA's decision because of a failure to consider, as opposed to properly weigh, mitigating circumstances.

the Congressionally delegated authority to make law. *Cf., Thomas Jefferson University*, 512 U.S. at 525 (1994)(resolution of statutory ambiguities is the "very purpose behind the delegation of lawmaking power to administrative agencies.")(Thomas, J., dissenting)(citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)); *Guernsey*, 514 U.S. at 109-110 (". . . [The] Secretary advances a view of the regulations that would force us to conclude that she has not fulfilled her statutory duty to promulgate regulations determining the methods by which reasonable Medicare costs are to be allocated.")(O'Connor, J., dissenting).

HUD's unequivocal assertion before the Court of Appeals does not alter this analysis. This Court has previously refused to defer to agency positions advanced by appellate counsel, rather than by the agency itself. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988)(citing, *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971)).[15] Moreover, the Court has noted the

[15]In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court gave controlling weight to an administrative interpretation appearing in the brief filed by the agency as *amicus curiae*. *Auer* has no application to this case, for at least three reasons. First, the delegated power at issue in *Auer* was quite specific: to define and delimit the scope of the exemption for executive, administrative, and professional employees. 519 U.S. at 457. Thus, the Court observed that "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Id.* at 463. In contrast, Congress has never delegated to HUD the specific power to abrogate state law defenses or judicial review, a fact which HUD implicitly concedes, given its assertion that none of its interpretations have preempted state law. Note 8, *supra*; Argument § II.A.1, *supra*. Accordingly, HUD has no power under the statute to modify or limit the tenant's rights and defenses under state law. *Accord, U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982)(less deference owed to regulation promulgated pursuant to general grant to "prescribe all needful rules and regulations," than to regulation issued under a specific grant of authority). Second, the interpretation at issue in *Auer* resolved an ambiguity which arose directly from the regulation, and was likely unforeseeable to the agency at the time that the regulation was promulgated, *viz.*, whether the regulation-defined exemption (discipline-based pay reductions) for coverage under the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, *as amended*, 29 U.S.C. §§ 201 *et seq.*, required a showing of actual likelihood of such a penalty, as opposed to a nominal possibility. In this case HUD has never published a regulation which directly

inappropriateness of according *Chevron* deference to an agency's interpretation arising for the first time in an adversarial brief. *Mead*, 121 S.Ct. at 2177, n.19 (declining to extend *Chevron* deference to agency's brief). Here, HUD can provide no good excuse for its failure to promulgate regulations, prior to this litigation, which would have resolved the ambiguities just discussed. *See, Thomas Jefferson University, supra* (agency's failure to issue clear regulation deprives adequate notice to affected persons)(Thomas, J., dissenting).

Furthermore, there is no reason to believe that Congress delegated authority to HUD to announce the abrogation of state law defenses and judicial review. On the contrary, the text of §1437d(*l*)(6) is absolutely silent in this regard—a silence that is all the more remarkable in light of Congress' practice, in other settings, of explicitly expressing its intentions to limit defenses to causes of

addresses two issues which *have* been within HUD's sights for many years, judicial review of adverse PHA decisionmaking, and the tenant's affirmative and equitable defenses. *See, Charlotte Housing Authority v. Patterson*, 120 N.C.App. 552, 557-58, 464 S.E. 2d 68 (N.C. App. 1995); *Allegheny County Housing Authority v. Hibbler*, 748 A.2d 786 (Pa.Cmwlth. 2000), *allocatur denied*, 759 A.2d 924 (Pa. 2000) *supra*. Given the absence of regulatory text explicitly addressing these issues, HUD cannot establish the premise underlying the Court's holding in *Auer*, namely, an ambiguity directly related to the actual terms of the regulation. Further, because these issues were foreseeable to HUD prior to the publication of its 2001 final rule, the failure to resolve them by regulation is inexcusable. *See, Guernsey*, 514 U.S. at 110 (O'Connor, J., dissenting). Third, the interpretation in *Auer* was advanced in an *amicus* brief, and as such could rightfully claim that it represented the agency's thorough and careful consideration. That situation is a far cry from HUD's colloquy with the Court of Appeals.

action,[16] or to curtail judicial review.[17] Moreover, HUD has admitted that its interpretations have no preemptive effect (*See*, n. 8, *supra*; Argument at II.A.1, *supra*), and thus implicitly concedes that Congress did not intend to supplant the tenant's state law protections against adverse PHA action.

HUD cannot claim that its interpretations are intended to resolve an ambiguity that arises from the regulations. Indeed, nowhere in its brief does HUD explain where such ambiguity might be found. On the contrary, because HUD attributes the policy choices embodied in its interpretations to Congress[18], and because HUD asserts that these policy choices are readily apparent[19], it necessarily implies that it has not engaged in the process of resolving regulatory ambiguity. Moreover, HUD's regulations do not even mention the issues of judicial review and equitable or affirmative

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[16]See, e.g., 42 U.S.C. § 12162(e)(2)(C) (Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*)("Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter."); 18 U.S.C. § 984(a)(1)(B) (civil forfeiture of fungible property)("[I]t shall not be a defense that the property involved in such an offense has been removed and replaced by identical property"); 7 U.S.C. § 1574 (Federal Seed Act, 7 U.S.C. §§ 1551 *et seq.*) ("The use of a disclaimer, limited warranty, or nonwarranty clause . . . shall not constitute a defense . . . in any proceeding brought under this chapter.").

[17]See, e.g., 7 U.S.C. § 136d(c)(2) (Federal Insecticide, Fungicide, and Rodenticide Act,7 U.S.C. §§ 136-136y)(order of Dept. of Agriculture administrator suspending pesticide registration "shall not be reviewable by a court" unless registrant requests hearing within five days of receiving notice of proposed suspension); 23 U.S.C. § 134(f)(2) (Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914.)(metropolitan planning organization's failure to consider factors relating to development of surface transportation systems "shall not be reviewable by any court under this title. . ."); 23 U.S.C. § 135(c)(2) (failure of state plan to consider factors relating to development of surface transportation systems "shall not be reviewable by any court under this title. . .").

[18]*See*, Argument at II.A.1, *supra*.

[19]HUD Brief at 36 (". . .[T]he plain language of Section 1437d(l)(6) unambiguously authorizes eviction without regard to tenants' knowledge of the drug-related activity of guests or other persons under their control.")

defenses. Consequently, this is not a case where the agency's interpretation is intended to resolve uncertainty over an issue which the agency's regulation directly addresses. Cf., *Auer*, 519 U.S. at 456 (1997)(exemptions from regulation-defined standard within Secretary's delegated authority to define and delimit scope of exemption); *Id.* at 461(controlling weight given to Secretary's interpretation of salary-basis test which is creature of regulation)(citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Finally, as a matter of policy this Court should not reward HUD for failing to legislate, by appropriate means, matters which have been within HUD's sights for years. Since at least the mid-1990's, HUD has been fully aware of the impact of judicial review and affirmative tenant defenses on proposed terminations of public housing tenancies, as those protections were determinative in numerous reported decisions. *See, e.g., Patterson, supra* (United States Housing Act prohibits imposition of strict liability); *Hibbler, supra* (PHAs must consider mitigating factors in public housing drug evictions; trial court properly credited tenant's claims of innocence in defense to eviction action). If one is to assume that these matters were important to HUD, one must also assume that HUD knew very well how to address them. See, Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, 66 Fed. Reg. 28776 (May 24, 2001). To grant controlling weight to HUD's informal interpretations, at this stage, would simply undermine the purposes upon which the APA was founded. *Guernsey*, 514 U.S. at 110 (disapproving of agency's resolution of foreseeable issue through informal interpretation rather than notice and comment rulemaking)(O'Connor, J., dissenting); *Id.* at 109-110 (". . . [The] Secretary advances a view of the regulations that would force us to conclude that she has not fulfilled her statutory duty to promulgate regulations determining the methods by which reasonable Medicare costs are to be allocated.").

b) To accord *Chevron* deference to HUD's interpretations would frustrate the interests which the *Chevron* doctrine is intended to advance.

In requiring deference to federal agency rulemaking, *Chevron* and its progeny serve three related interests: vesting policy making in federal agencies accountable to the President (467 U.S. at 864-865),[20] vesting policy making in agencies whose expertise exceeds that of the judiciary (467 U.S. at 865), and promoting uniformity of results. *See, Mead*, 121 S.Ct. at 2175 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting")(declining to extend *Chevron* deference). *See, also*, Merill & Hickman, Chevron's Domain, 89 Geo.L.J. 833, 861 (2001).

Deference in these circumstances would fail to serve any of the above interests. In the first place, HUD's rulemaking does not purport to represent a policy choice by HUD. Indeed, the ultimate decisionmaking presented by this case materializes only in the actions of local state-commissioned PHAs in resolving disputes (or not) according to any number of mitigating circumstances. Thus, HUD and petitioner Oakland Housing Authority are not invoking *Chevron* to protect the policy choices of an agency accountable to the President. See, K. Davis & R. Pierce at § 2.5, p. 54 (accountability turns, *inter alia*, on issue of whether President has power to recall head of agency for cause). Consequently, *Chevron*'s goal of political accountability cannot be served. Furthermore, the question of whether indigent persons should have a meaningful right to judicial review of a state agency's decision to terminate essential housing benefits, is not one for which a court is less qualified than the agency to answer. It is not a question that is peculiar to the realm of assisted housing, nor does it require agency expertise in order to reach the

[20]See, generally, K. Davis & R. Pierce, Admin. Law Treatise, §2.5, at 60 ("[*Chevron*] supports a holding that the basic concept of democracy requires that all government policymaking that does not take place through the legislative process must be subject to Presidential control.")

correct answer. Cf., *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981)(agency's interpretive authority justified in light of Social Security Act's complexity). Finally, by proposing that the various local PHAs should decide, on a case-by-case basis, whether and to what extent to permit tenants to assert the defense of innocence and other mitigating circumstances, HUD necessarily promotes a non-uniform regime. In sum, HUD's interpretations do not serve the interests upon which the *Chevron* doctrine is based, and instead will undermine those interests.

c) HUD's interpretations which purport to prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, fail to satisfy the standard for deference under *Skidmore*.

Assuming *Chevron* deference is inapplicable, the next inquiry is whether the interpretations are due any deference under *Skidmore*. As articulated by *Mead*, the degree of deference due under *Skidmore* depends upon a weighing of five factors: (1) the thoroughness of the agency's consideration, (2) the validity of the agency's reasoning; (3) the degree of agency expertise evident in the interpretation; (4) the consistency of the interpretation in light of the agency's earlier and later pronouncements; and (5) all other factors bearing on the persuasiveness of the interpretation. *Mead*, 121 S.Ct. at 2172 (quoting *Skidmore*, *supra*); 121 S.Ct. at 2175 (interpretation has colorable claim to *Skidmore* deference where regulatory scheme highly detailed and agency can bring specialized experience to bear).

HUD's interpretations fail in all five respects. To begin with, HUD's assertions that Congress had abrogated the right to any judicial review of PHA decisionmaking, as well as the tenant's affirmative and equitable defenses, only arose in an adversarial proceeding before the Court of Appeals. Such reasoning cannot constitute an agency's "fair and considered" judgment. *Cf., Auer*, 519 U.S. at 462. The fact that HUD's deliberations have produced

little in the way of certainty, and much in the way of ambiguity, only reinforces the point.

HUD's interpretations also reveal significant lapses in the agency's reasoning. For example, HUD asserts that neither its proposed (1999) nor final (2001) rules preempted state law. That assertion cannot be reconciled with HUD's argument before the Court of Appeals, where HUD announced the abrogation of the right to judicial review of adverse PHA decisionmaking, as well as the nullification of the tenant's affirmative and equitable defenses.

HUD's interpretation of the rationales for § 1437d(*l*)(6) evidences a similar inconsistency. In the preamble to the 1991 final rule, HUD asserted that § 1437d(*l*)(6) permitted liability without regard to actual tenant fault or knowledge of crime. 56 Fed. Reg. at 51567. That assertion, when paired with HUD's view that the PHA has ultimate responsibility for deciding whether to sue, implies necessarily that a completely innocent tenant might nonetheless be evicted, despite having taken reasonable steps to prevent the commission of crime. See, 237 F.3d at 1124 ("HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless."). Such a result, in turn, conflicts with HUD's assertions regarding the several purposes underlying § 1437d(*l*)(6). According to HUD, § 1437d(*l*)(6) promotes deterrence by several methods: (1) by coercing tenants, under threat of strict liability evictions, to educate household members and guests of the serious consequences of drug-related criminal activity and to encourage tenants to take "whatever" steps are necessary to protect the security of the housing development (HUD Brief at 35-36); (2) by increasing the PHA's ability to remove drug criminals by reducing the PHA's evidentiary burdens at trial (*Id.*); and (3) by permitting "partial evictions," i.e., removal of only the offending household member from the residence. 56 Fed. Reg. at 51567 ("If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit."). HUD's suggestion that partial eviction is a workable

remedy cannot be correct. Clearly, no tenant has an incentive to report crime committed by another household member if doing so will only expose the reporting tenant to the risk of eviction. As HUD acknowledges, its interpretations in no way restrain a PHA from proceeding with the eviction of the innocent, reporting tenant. Moreover, the regime suggested by HUD is inherently arbitrary, given that it permits some innocent tenants to be evicted, as a result of strict liability enforcement, and others to stay, as a consequence of partial eviction. Such leniency cannot further the ostensible goal of deterrence, and would instead be far more likely to frustrate it.

Finally, HUD's recognition of the relevance of mitigating circumstances (See, 24 C.F.R. § 966.4(l)(5)(vii)(B)) is undermined by the paired counter-assertions that (1) PHAs may, at their election, refuse to consider these circumstances at all, and (2) no court may review the PHA's decision to ignore such evidence. See, 66 Fed. Reg. 28783 (PHA may forego exercise of discretion altogether)(". . . [C]onferring discretion on PHAs to take action does not require them to take action . . ."); 237 F.3d 1113, 1123, n. 3 (no judicial review of PHA decisionmaking). Clearly, mitigating circumstances are not relevant if the law permits their rejection in every case. No matter how unlikely such an outcome may be, it is nonetheless entirely consistent with HUD's interpretations. Indeed, HUD conceded at oral argument before the Court of Appeals that there was nothing more that Respondent Pearlie Rucker could have done to protect herself from eviction, but argued that the statute nonetheless authorized her eviction. *Id.* at 1124. Assuming mitigating circumstances truly merit HUD's respect, it is remarkable that HUD did not envision a role for them in the forum where factual findings are actually made, and where the question of eviction is ultimately decided. HUD's interpretation precludes the presentation of such evidence to a court of law, and instead leaves the weighing of these circumstances to state-commissioned agencies, with no enforceable standards to guide them, and with all-too-obvious results.

The third inquiry under *Skidmore* is also not met in this case. Whether a tenant should have a meaningful right to judicial review of adverse agency action, or the right to raise affirmative and

equitable defenses to an eviction action, are not questions for which HUD, or any agency, is more qualified than the judiciary to answer. Neither question is peculiar to the realm of assisted housing, and neither requires agency expertise for the correct answer. *Gray Panthers*, *supra*.

The fourth factor under *Skidmore* is just as unavailing. As described above, HUD's denial of preemptive effect irreconcilably conflicts with HUD's assertions regarding the abrogation of judicial review and affirmative and equitable defenses. Furthermore, HUD's unequivocal assertion to the Court of Appeals regarding judicial review, which later appeared in the 2001 preamble, is not consistent with HUD's 1991 preambular discussion, given that the latter did not foreclose the issue, as does the former.

Finally, HUD's position is unpersuasive by any general measure. In addition to the reasons stated previously, *Amici* stress two additional concerns. First, recipients of need-based benefits are, as a consequence of their indigence, among society's most vulnerable citizens. In recognition of this fact, Congress has required that they not suffer arbitrary termination of the benefits that are essential to their survival. Thus, for nearly two decades Congress has required PHAs to use leases that prohibit termination of assistance in the absence of "serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 U.S.C. § 1437d(*l*)(5) (1994 & Supp. V 1999). This protection, known as the good cause doctrine, recognizes that need-based housing assistance is of such critical importance to low-income persons that it should not be terminated in the absence of evidence that the tenant herself is guilty of serious misconduct. *See, e.g., Maxton Hous. Auth. v. McLean*, 328 S.E.2d 290 (N.C. 1985); *Messiah Baptist Hous. Dev. Fund Co. v. Rosser*, 400 N.Y.S.2d 306 (N.Y.City Ct. 1977); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341 (W.Va. 1988). HUD's proposed construction of § 1437d(*l*)(6) obtains precisely the evil that the good cause doctrine was designed to eradicate, as it leads necessarily to the eviction of innocent persons without regard to culpability, and with no right of judicial review to curb agency abuse. See, 237 F.3d 1113 at 1124. Indeed, agency abuse was precisely the problem that led

courts, and later Congress, to develop the good cause requirement in the first place.[21]

Second, to the extent that PHAs expend scarce resources to evict innocent persons, actual crime will go unchecked. While *Amici* can find no fault with a PHA's efforts to rid public housing complexes of actual offenders, there is nothing to be gained by casting innocent and needy persons into the street for crimes that they could have done nothing to prevent.

B. Because HUD's interpretations are entitled to no deference, the construction of § 1437d(*l*)(6) urged by the respondents should control.

Because HUD's interpretations are entitled to no deference, this Court should give controlling weight to the construction of § 1437d(*l*)(6) advanced by the respondents, in light of the overall purpose of the United States Housing Act. According to that construction, Congress has clearly prohibited the termination of public housing assistance for criminal activity that the tenant neither knew of nor had reason to know. Consequently, Congress could not have intended to abrogate the tenant's affirmative and equitable defenses, nor the tenant's right to judicial review of adverse PHA decisionmaking, as these are plainly necessary to protect against erroneous and unwarranted termination of essential housing assistance.

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[21]The good cause standard evolved first as a matter of case law. During the McCarthy Era, a number of PHAs required tenants to sign loyalty oaths as a condition of their continued tenancy. When tenants refused to sign, the PHAs attempted to evict them. A number of courts held that the tenants' refusal was not good cause to evict, because eviction on that ground had no rational relationship to the purposes of public housing. *See, e.g., Hous. Auth. v. Cordova*, 279 P.2d 215 (Cal. App. Dep't Super. Ct. 1955); *Chicago Hous. Auth. v. Blackman*, 122 N.E.2d 522 (Ill. 1954).

Conclusion

For the above reasons, *Amici Curiae* respectfully request that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE
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UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

V.

PEARLIE RUCKER, ET AL.,

Respondents.

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FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES (CLPHA), HOUSING AND DEVELOPMENT LAW INSTITUTE (HDLI), NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS (NAHRO), AND PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION (PHADA) IN SUPPORT OF PETITIONER

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No. 00-1770

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PEARLIE RUCKER, ET AL.,
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BRIEF *AMICI CURIAE* OF COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES (CLPHA), HOUSING AND DEVELOPMENT LAW INSTITUTE (HDLI), NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS (NAHRO), AND PUBLIC HOUSING AUTHORITIES DIRECTORS ASSOCIATION (PHADA) IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE[1]

Council of Large Public Housing Authorities (CLPHA) is a not-for-profit organization whose membership consists of 55 of the largest public housing authorities (PHAs) in the

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[1] The parties have consented to the filing of this brief. The consents have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae*, CLPHA, HDLI, NAHRO and PHADA, state that the counsel named below authored this brief in its entirety, and no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

country. CLPHA members collectively own and manage 40% of the nation's public housing stock. CLPHA's function is to educate and advocate on behalf of its membership before the United States Congress and various government agencies, including HUD, and to research and develop policy on matters relevant to the operations and funding of public housing.

Housing and Development Law Institute (HDLI) is a nationwide nonprofit organization that acts as a legal resource to local public housing agencies and their legal counsel. In addition to publishing legal periodicals and conducting educational activities relating to the law of affordable housing, HDLI acts on its members' behalf with respect to legal aspects of state and federal housing policy.

National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide nonprofit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, with membership including more than 8,000 agencies and local officials, NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. NAHRO's member agencies own or manage approximately 99% of all public housing in the United States. NAHRO has played a key role in the development and implementation of the nation's housing programs since their inception.

Public Housing Authorities Directors Association (PHADA) is a nationwide nonprofit advocacy organization formed in 1979 whose membership consists of approximately 1900 executive directors of public housing agencies. In addition to advocating for better, more efficient administration of the federal affordable housing programs, PHADA conducts a variety of training and educational activities concerning the development and operation of affordable housing.

The organizations comprising the *amici curiae*, represent public housing agencies (PHAs) and individuals responsible for managing virtually all of the nation's public

housing units. The *amici curiae* believe that the legal standards governing the removal of public housing families whose members and guests commit crimes vitally impact upon the ability of PHAs to successfully manage their public housing. The *amici curiae* further believe that, if sustained, the decision under review will have a disastrous effect upon the efficacy of PHAs' efforts to combat illegal drugs and crime in public housing developments and, consequently, upon the physical and social well-being of the hundreds of thousands of law-abiding residents of public housing.

SUMMARY OF ARGUMENT

This case involves the meaning of statutory language that authorizes terminations of public housing tenancy for drug-related and other criminal activity engaged in by public housing tenants, household members, guests or other persons under the tenant's control. The court below determined that the language was ambiguous because it did not specifically address whether proof of the tenant's knowledge of, or lack of effort or ability to prevent, criminal drug activity by a household member or guest was prerequisite to eviction. It then determined, through resort to certain legislative statements and the application of certain devices of statutory construction, that Congress must have intended the statute to include such a requirement.

Amici curiae argue first that, because the statutory language at issue is clear and unambiguous on its face, the lower court erred in consulting materials extrinsic to the statutory language. Even if such an inquiry were appropriate, however, the lower court's determination of congressional intent was erroneous. Its inquiry ignored available information created contemporaneously with the original enactment of the statutory language in 1988 and, instead, improperly focused on non-historical, noncontemporaneous legislative statements which did not, and could not have, represented the intent of Congress. A proper inquiry, focusing upon genuine legislative history created in connection with the enactment of the statutory language in question, together with consideration of all relevant subsequent indications of congressional intent, reveals an intent

directly contrary to that found by the court below.

The court below improperly failed to defer to the definitive interpretation of the statute by the United States Department of Housing and Urban Development (HUD). Such deference is required by prior decisions of this Court.

By assuming that PHAs may evict individual household members, the decision under review misconceived the nature of state laws under which public housing evictions proceed. With rare exception, these laws contemplate only actions for possession of real property.

In determining that an innocent tenant defense must be read into the statute, the court below also ignored the practical realities faced by PHAs in their efforts to control illegal drugs and crime in their developments. First, the lower court's decision ignores the endless character of the public housing lease, which forecloses to PHAs the option not to renew leases and necessarily increases their reliance on the remedy of eviction. Additionally, PHAs, when they must evict, have little practical ability to prove a tenant's prior knowledge of criminal activity committed by a household member or guest. Similarly, they have no practicable means of rebutting self-serving assertions by tenants that efforts have been made to discourage criminal activity. Finally, judicial imposition of an innocent tenant defense will discourage tenants from cooperating in the removal and bar of criminal offenders from public housing environments, a step that constitutes in many instances the only viable alternative to eviction of entire households. If sustained, the decision under review will seriously interfere with the ability of PHAs to combat drugs and crime in public housing.

Congress and HUD have conferred upon the PHAs, not the courts, the discretion to determine, once a lease violation is established, whether eviction is the proper course of action. These discretionary decisions involve a complex array of considerations, only some of which concern fairness to members of the household whose tenancy would be terminated. The full range of relevant considerations affecting each case are

usually are known only to the PHA. Thus, it is the PHA which is best positioned, and which has been given the authority under the regulatory scheme, to determine issues of fairness in individual cases.

Amici curiae urge that imposing responsibility on the tenant for assuring that members of the household and guests will not engage in criminal activity is neither unreasonable nor, as asserted by the court below, "odd and absurd." This is especially so, since retaining a family whose members or guests commit crimes has the effect of excluding from the scarce resource that is public housing an equally needy family whose members do not commit crimes. The proper inquiry in this case is not whether the PHA has exercised its discretion fairly in particular cases, but whether Congress and HUD have acted reasonably in repositing with the PHAs the discretion to determine when eviction is the appropriate remedy. In view of the seriousness of the drug and crime problems addressed by the legislation enacting the statutory language in question, there can be no doubt that Congress and HUD did act reasonably.

ARGUMENT

The Oakland Housing Authority (OHA) brought state court unlawful detainer actions to evict four tenants from public housing because of drug-related criminal activity engaged in by household members or guests. Each of the tenants asserted that he or she had no prior knowledge of, or involvement in, the criminal activities precipitating the evictions and, as such, each was an "innocent tenant." The United States Court of Appeals for the Ninth Circuit (Ninth Circuit), acting *en banc*, ruled 7 to 4 that the applicable HUD regulations and OHA's lease provision carrying out the regulations were invalid because the authorizing statutory provision for the HUD regulations did not contemplate the eviction of innocent tenants. The court held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, [the statute] does not authorize the eviction of such a tenant." *Rucker v. Davis*, 237

F.3d 1113, 1126 (9th Cir. 2001).[2]

The matter before this Court involves the meaning of § 6(*l*)(6) of the United States Housing Act of 1937 (Housing Act), and more specifically the meaning of the portion of this paragraph that is underlined below. Section 6(*l*)(6) was originally enacted (as § 6(*l*)(5)) in the Anti-Drug Abuse Act of 1988 (Drug Act).[3] As enacted in 1988, it required public housing leases to provide that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy. (emphasis added).

The 1988 provision has been modified minimally by Congress. An amendment in 1990 added the condition that for criminal activity (other than drug-related criminal activity)[4] to

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[2] The court affirmed injunctive relief against evictions for drug-related activity occurring outside the unit in circumstances in which the tenant neither knew nor had reason to know of the criminal activity. With respect to evictions for drug-related activity within the unit, the court recognized a rebuttable presumption that the tenant controlled the activity. *Id.* at 1126-27.

[3] Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988).

[4] Section 714(a) of S. 566, as reported by the Senate Committee on Banking, Housing, and Urban Affairs, would also have made drug-related criminal activity subject to the condition that the activity threaten the health, safety or right to peaceful enjoyment of the premises by other tenants, S. Rep. No. 101-316, at 179 (June 8, 1990), but this condition was removed in conference. *See* H.R. Conf. Rep. No. 101-943, at 111 (Oct. 25, 1990). As amended by the Senate reported bill, paragraph (5) of § 6(*l*) of the Housing Act read as follows:

be grounds for eviction, the criminal activity had to be a threat to the health, safety or right to peaceful enjoyment of the premises by other tenants, and the 1990 amendment also rephrased the provision without any further substantive change.[5] *The 1990 amendment did not address or change the provisions of the 1988 law that are relevant to this case.* Finally, in 1996 the geographic limitation that required drug-related criminal activity to have occurred on or near the public housing premises was removed.[6] The amended language, which has not been further changed, requires public housing agencies to utilize leases that:

> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy....[7]

> (5) provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in activity that adversely affects the health, safety, and right to quiet enjoyment of the premises by other tenants and shall not engage in criminal activity, including drug-related criminal activity, that threatens the health or safety of, or right to quiet enjoyment of the premises by, other tenants, and such criminal activity shall be cause for termination of tenancy.

The Senate reported bill did not rewrite paragraph (5), but merely deleted and added language to paragraph (5), none of it touching the language in paragraph (5) that is at issue before this Court. S. 566, 101st Cong. (1990).

[5] This paragraph was rephrased by the conferees and enacted in substantially its current form, Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990).

[6] Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9(a)(2), 110 Stat. 834, 836 (1996).

[7] 42 U.S.C. § 1437(d)(*l*) (emphasis added).

This statutory language is unambiguous in not providing an "innocent person" defense to a PHA's authority to evict a tenant for the criminal acts of a household member or guest.[8]

I. THE LOWER COURT'S DETERMINATION OF CONGRESSIONAL INTENT WAS ERRONEOUS.

Assuming, *arguendo*, that an inquiry to determine congressional intent beyond the plain language of the statute is appropriate, any inquiry into legislative intent should focus on the provision enacted in 1988. The Anti-Drug Abuse Act of 1988 was multi-faceted legislation that reflected the apprehension of Congress and the public over the perceived escalation in drug activity in public housing and elsewhere.[9] In

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[8] Essentially, the court below asserted that § 6(*l*)(6) was facially ambiguous, not because of what it says, but rather because of what it does *not* say. The *amici curiae* find nothing unclear about the language and urge that to apply such a standard would subject virtually any text that does not specify what it does not mean, or what it does not say, to a charge of ambiguity. This Court has stated that where the statutory command is straightforward, there is no reason to resort to legislative history. "Where there is no ambiguity in the words, there is no room for construction...." *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (internal quotations and citations omitted). Section 6(*l*)(6) should be given its plain meaning. *See also United States v. James*, 478 U.S. 597, 606 (1986) ("We have repeatedly recognized that [when] . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances . . . . In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.") (internal quotations and citations omitted).

[9] *E.g.*, House Comm. on Gov't Operations, *Just Saying No Is Not Enough: HUD's Inadequate Response To The Drug Crisis In Public Housing*, H.R. Rep. No. 100-702 (June 15, 1988). Indeed, Congress' findings contained in the Drug Act communicate dramatically the concerns that prompted the enactment of § 6(*l*)(6) and the other provisions of the Drug Act:

> (1) the Federal Government has a duty to provide public housing that is decent, safe, and free from illegal drugs;
>
> (2) public housing projects in many areas suffer from rampant drug-related crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public housing tenants;
>
> (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public housing, particularly in light of the recent reductions in Federal aid to cities.

Anti-Drug Abuse Act of 1988, § 5122, 102 Stat. at 4301.

the House, the Drug Act was assembled through the efforts of ten committees.[10] Although the version of the Drug Act as passed by the House on September 22, 1988, contained several provisions relating to drug activity in public housing, it did not contain the eviction provision that later became section 5101 of the Drug Act.[11]

The House-passed bill was amended on the Senate floor, and the eviction provision was added to the bill as part of a substitute amendment to the House-passed bill offered on October 13, 1988, by the majority leader, Senator Byrd.[12] A compromise between the House and Senate versions of the bill

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[10] The House-passed bill, H.R. 5210, headed ten titles of the bill by the Committee with jurisdiction over the provisions in the title: Title I – Committee on Banking, Finance and Urban Affairs; Title II – Committee on Education and Labor; Title III – Committee on Foreign Affairs; Title IV – Committee on Government Operations; Title V – Committee on Interior and Insular Affairs; Title VI – Committee on the Judiciary; Title VII – Committee on Merchant Marine and Fisheries; Title VIII – Committee on Public Works and Transportation; Title IX – Committee on Ways and Means; Title X – Committee on Energy and Commerce. *See* Omnibus Drug Initiative Act of 1988, H.R. 5210, 100th Cong. (1988).

[11] Omnibus Drug Initiative Act of 1988, H.R. 5210, 100th Cong. (1988). *See also* 134 Cong. Rec. 24,925 (Sept. 22, 1988) (House passes H.R. 5210).

[12] The Byrd amendment consisted of the text of S. 2852, introduced on October 3, 1988, by Senator Nunn, with 50 cosponsors. *See* 134 Cong. Rec. 30,207, 30,326 (Oct. 13, 1988) (text of Byrd Amendment No. 3677, Omnibus Anti-Substance Abuse Act). The Senate substitute bill for HR 5210, which included the Byrd substitute as well as numerous amendments, was passed on October 14, 1988. *See* 134 Cong. Rec. 30,826 (Oct. 14, 1988).

was informally reached, and it was approved by the House on October 21, 1988, and by the Senate on the same day.[13]

Because of the expeditious movement of the bill to enactment, a formal conference and conference report were not pursued. A statement and summary of the public housing provisions was provided on the House floor on October 21, 1998, by Congressman Chalmers Wylie, the ranking minority member of the Committee on Banking, Finance and Urban Affairs.[14] In the Senate, Senator Joseph Biden, chairman of the Judiciary Committee, inserted in the Congressional Record an analysis of the provisions of the Drug Act under the jurisdiction of the Judiciary Committee, including forfeiture provisions allowing public housing units to be seized from tenants who violate drug laws.[15] The analysis also covered the public housing eviction provision. Senator Biden said that it is "important for there to be a detailed statement in the RECORD of Congress' intent in enacting these provisions."[16]

The analysis stated that the eviction provision, section 5101 of the Drug Act, "codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families, or their guests engage in drug-related criminal activity."[17] On August 30, 1988, HUD had published comprehensive final regulations on public housing lease

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[13] 134 Cong. Rec. 33,147, 33,318, 32,630, 32,678 (Oct. 21, 1988).

[14] 134 Cong. Rec. 33,149 (Oct. 21, 1988) (statement of Congressman Wylie describing the lease and eviction provision as confirming the legal authority of PHAs to evict a tenant for drug-related criminal activity of the tenant, a member of the tenant's household, or a guest or other person under the tenant's control).

[15] 134 Cong. Rec. 32,692 (Oct. 21, 1988).

[16] *Id.*

[17] *Id.*

provisions and termination of tenancy.[18] It is reasonable to assume that the guidelines mentioned by Senator Biden refer to these regulations. At the time of Senator Biden's comments, the HUD regulations treated the illegal acts of household members and of guests or other persons in separate provisions.[19] These provisions made it clear that if a household member committed a violent crime or conducted illegal drug activity, the tenancy of the entire family could be terminated.[20] Similarly, a tenant and

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[18] Tenancy and Administrative Grievance Procedure for Public Housing Final Rule, 53 Fed. Reg. 33,216 (Aug. 30, 1988). After Congressional review of the regulation, it was made effective on November 7, 1988. 53 Fed. Reg. 40,221 (Oct. 14, 1988). However, HUD withdrew the notice of effective date, 53 Fed. Reg. 44,876 (Nov. 7, 1988), after a temporary restraining order was issued in an action brought by the National Tenants Organization in the District Court for the District of Columbia. After a preliminary injunction was issued by the court on January 25, 1989, because of questionable provisions in the regulations involving grievance procedures, *National Tenants Org. v. Pierce*, No. 88-3134 (D.D.C. Jan. 25, 1989), HUD withdrew the final rule. 54 Fed. Reg. 6,886 (Feb. 15, 1989).

[19] 53 Fed. Reg. 33,306 (Aug. 30, 1988). Section 966.10(i) of these regulations provided with respect to household members:

> (i) Crime. (1) In addition to the provisions required by § 966.10(h)(2)(iii), the lease may provide that any of the following criminal activities by any Household member, on or off the premises, shall be a violation of the lease, or other good cause for termination of tenancy:
> (i) Any crime of physical violence to persons or property.
> (ii) Illegal use, sale or distribution of narcotics.

The relevant provision for guests and other persons was contained in section 966.10(h)(2)(iii), which stated that the lease should provide that the tenant and other members of the household:

> (iii) Shall not engage in criminal activity in the dwelling unit or premises, and shall prevent criminal activity in the unit or premises by guests, visitors, or other persons under control of Household members....

[20] 53 Fed. Reg. 33,227-33,228 (Aug. 30, 1988) (the preamble to the final regulations stated, with respect to household members, that: "the final rule adds a new provision (§ 966.10(i)(1)) authorizing the PHA to include a

any household members who invited guests, visitors or other persons into the unit or onto the premises were responsible for the criminal acts of these persons and their tenancy could be terminated because of the illegal acts of these persons.[21]

The intent of Congress in framing and enacting section 5101 of the Drug Act, according to Senator Biden, one of the Drug Act's managers, is similar to the policy expressed in the contemporaneous preamble and regulations promulgated by HUD, and that policy would permit the eviction of a tenant for violent criminal or unlawful drug activities of any household members and such actions by any invited guests or other persons under the control of the tenant or a household member.

Further confirmation on the meaning of section 5101 of the Drug Act occurred the following year in response to HUD's waivers of the time-consuming administrative grievance hearings prior to eviction in favor of direct access to state courts by a PHA wishing to terminate a tenancy.[22] A provision not in

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lease provision allowing eviction of a family for two categories of on-site or off-site criminal activity by a family member…").

[21] *Id.* at 33, 229. The preamble to the final rule stated:

> The final rule contains a single uniform formulation of the tenant's contractual responsibility for third party acts. The tenant and other members of the household must "prevent" disturbance, damage or illegal acts by "guests, visitors, or other persons under control of Household members"… The tenant should only be responsible for acts by guests or visitors (i.e., persons who enter the unit with the consent of the household), or by other persons under control of the household.

The preamble gives one example of a person not under control of the tenant – a burglar who breaks into the unit.

[22] *Drugs in Federally Assisted Housing: Hearing on S. 566 Before the Subcomm. on Hous. and Urban Affairs of the Senate Comm. on Banking, Hous. and Urban Affairs*, 101st Cong. 8, 75 (July 20, 1989) (statement of Wade J. Henderson, Associate Director, American Civil Liberties Union, Washington, D.C.).

either House or Senate bill was added in conference to a supplemental appropriations bill, enacted on June 30, 1989, which prohibited such waivers where the PHA wished to evict household members who were not involved in the drug-related criminal activity of another household member.[23] The right of a PHA to evict "innocent" household members pursuant to section 5101 of the Drug Act was implicit in Congress' adoption of this limiting amendment. As soon as wider awareness of this provision occurred, the Administration and Members of Congress reacted strongly to the 1989 law, with Congressman Wylie, ranking member of the House Committee on Banking, Finance and Urban Affairs, complaining on the House floor that the amendment, among other things, "prohibits evictions of any other household member who is not involved in such drug-related criminal activity."[24] Congress moved quickly to repeal the provision and it was repealed in the law making appropriations for HUD in FY 1990, which was enacted on November 9, 1989.[25] The Senate Committee Report on this bill states crisply that the repeal of this provision "is necessary to permit expeditious and effective response to drug-related

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[23] Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404(b), 103 Stat 97, 128 (June 30, 1989). Section 404(b) read:

> (b) Upon conclusion of the review mandated by subsection (a), if the Secretary determines that due process standards are met for a jurisdiction, the Secretary shall issue that jurisdiction a waiver of the procedures required in section 6(k) of the United States Housing Act of 1937, 42 U.S.C. 1437d(k), for evictions involving drug-related criminal activity which threatens the health and safety of other tenants or public housing authority employees as long as evictions of a household member involved in drug-related criminal activity shall not affect the right of any other household member who is not involved in such activity to continue tenancy.

[24] 135 Cong. Rec. H3942 (daily ed. July 19, 1989) (statement of Rep. Wylie).

[25] Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, Title II - Administrative Provisions, 103 Stat. 839, 853 (Nov. 9, 1989).

criminal activity in public housing units."[26]

Further efforts were made to mitigate the impact of section 5101 of the Drug Act on innocent persons in H.R. 1180, the proposed "Housing and Community Development Act of 1990". As approved by the House Subcommittee on Housing and Community Development on May 10, 1990, the bill contained a provision requiring PHAs, in determining whether to terminate tenancy because of criminal activity, to consider the "effects that eviction or termination would have on any family members not aware of or involved in the criminal activity...."[27] This provision was eliminated by an amendment during mark-up by the full Banking Committee, and instead language almost identical to the language stricken from the bill was inserted in the House Committee Report.[28] The only remnant of the effort during 1989 and 1990 to temper the effect of section 5101 on innocent tenants through statutory provisions

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[26] S. Rep. No. 101-128, at 60 (Sept. 13, 1989).

[27] HOUSE COMM. ON BANKING, FIN. AND URBAN AFFAIRS, 101ST CONG., SHOWING H.R. 1180 AS REPORTED BY THE SUBCOMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT ON MAY 10, 1990 (Comm. Print May 21, 1990). Section 503(a) of H.R. 1180 provided in part:

> In any instance of criminal activity, in determining action with respect to eviction or termination, the agency shall consider all of the circumstances of the particular case known to the agency, including the seriousness of the offense, the extent of knowledge or participation by family members, the effects that eviction or termination would have on any family members not aware of or involved in the criminal activity, and the impact on the rights or safety of other tenants or employees of the public housing agency.

[28] H. R. Rep. No. 101-559, at 34 (June 21, 1990) (H.R. 1180, as reported on June 21, 1990, no longer contained the language in § 503 quoted in the immediately preceding footnote.) Judge Breyer's district court opinion alluded to failed attempts to obtain the enactment of an innocent tenant defense when it acknowledged the assertion of the defendants that "the authors of the Senate report cited by the plaintiffs simply did not prevail in their attempts to include language in the statute which would have protected 'innocent' tenants." *Rucker v. Davis*, No. C 98-00781 CRB, 1998 U.S. Dist. LEXIS 9345, at *17, (N.D. Cal. June 19, 1998).

was the precatory language of the House Committee Report and of the Senate Committee Report on its version of 1990 housing legislation.[29] The statement in the 1990 Senate Committee Report relied upon by the lower court as relevant legislative history is not legislative history with respect to the innocent tenant issue before this court, but is merely the expression by a Committee of one body of Congress as to what would be an appropriate implementation of a law enacted by a previous Congress.[30]

II. ASSUMING, *ARGUENDO*, THAT THE NINTH CIRCUIT PROPERLY CONSULTED NONCONTEMPORANEOUS LEGISLATIVE STATEMENTS, IT ERRED IN FAILING TO CONSIDER ALL RELEVANT EVIDENCE OF CONGRESSIONAL INTENT.

Amici curiae urge that if inquiry into legislative statements subsequent to the original enactment of the statutory language in question is permitted, it should not be selective. The court did not mention, for example, that, in addition to the Senate report relied upon as indicative of congressional intent, a conference report was also issued for the 1990 Act. This report – which must be considered the dispositive explanatory

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[29] S. Rep. No. 101-316, at 179 (June 8, 1990). The House bill as reported or passed did not contain a similar provision as the Senate bill which revised somewhat the language enacted in 1988 in section 5101 of the Drug Act. *See* H.R. Conf. Rep. No. 101-943, at 418 (Oct. 25, 1990) (Joint Explanatory Statement of the Committee of Conference).

[30] S. Rep. No. 101-316, at 179 (June 8, 1990). The Report states:

> This section would make it clear that criminal activity, including drug related criminal activity, can be cause for eviction only if it adversely affects the health, safety, and quiet enjoyment of the premises. The committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity.

document issued for the entire Congress concerning the 1990 Act – does not contain the Senate report language relied upon by the court below. Although it states that criminal activity "engaged in by a public housing tenant, any member of the tenant's household, or any guest [*sic*] or other person under the tenant's control, shall be cause for termination of tenancy", it makes no mention of an innocent tenant defense. The text of the pertinent conference report language is set forth in full in the Appendix (App. 9a).

Additionally, since 1990, Congress has legislated several times with respect to control of illegal drugs and crime in public housing.[31] Yet, on none of these occasions has it seen fit to enact an innocent tenant defense, notwithstanding its awareness of HUD's interpretation that no such defense exists under the statute. This is "persuasive evidence that the interpretation is the one intended by Congress." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

A direct post-1990 expression of Congressional intent to authorize the removal of entire households from public housing because of the criminal activity of individual members of the household is found in § 577(a) of the Quality Housing and Work Responsibility Act of 1998 (QHWRA). That section provides that:

> a public housing agency . . . shall establish standards or lease provisions for continued assistance or occupancy . . . that allow the agency . . . to terminate the tenancy or assistance for any household with a member – [who is illegally using drugs or whose abuse of drugs or

[31] Section 9(a)(2), Housing Opportunity Program Extension Act of 1996, note 6, *supra*. The most substantial legislation addressing illegal drugs, alcohol abuse and crime in public housing and other assisted housing was enacted in Subtitle F (§§ 575-579) of the Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, §§ 575-579, 112 Stat. 2518, 2634-2643 (1998). Other isolated provisions addressing methamphetamine production in public housing and fleeing felons and probation or parole violators were also enacted during the post-1990 period.

> alcohol may constitute a threat to other residents].

QHWRA, § 577(a), 112 Stat. at 2640-41 (emphasis added).

This language clearly indicates an intent of Congress to permit the removal of entire households from public housing based on the drug or alcohol abuse on the part of individual household members. A contrary congressional intent with respect to other, often more serious, drug-related or other criminal activity is highly unlikely. An intent to hold the entire household responsible for the actions of its members is also seen in other QHWRA provisions relating to admission.[32] A contrary construction of § 6(*l*)(6) would contradict the clear intent of these provisions and would undermine their effectiveness. These provisions and other post-1988 enactments relating to exclusion and removal from public housing of families whose household members engage in criminal misconduct should be read as a consistent whole. When they are, they reveal a conscious long-term congressional policy directly contrary to that found by the Ninth Circuit. Congress intended in the plain language it enacted in 1988 to hold tenants responsible for the criminal misconduct of members of their household and their guests, and it has remained of that mind.

III. THE COURT BELOW ERRED IN FAILING TO DEFER TO THE DEFINITIVE INTERPRETATION OF THE STATUTORY LANGUAGE BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

[32] Similar language in QHWRA § 576(b) prohibits admission "*for any household with a member*" who the PHA determines is using a controlled substance or who has a pattern of abuse of alcohol that may threaten others. QHWRA, § 576(b), 112 Stat. at 2639 (italics added). QHWRA § 576(c) similarly provides that if a PHA determines that "*an applicant or any member of the applicant's household*" was engaged in certain types of criminal activity during a reasonable period preceding the application, then the PHA may deny "*such applicant*" (*i.e.*, the entire household) admission to the program. QHWRA, § 576(c), 112 Stat. at 2640 (italics added).

The meaning ascribed by the Ninth Circuit to Housing Act § 6(*l*)(6) directly contradicts the conclusions reached concerning this language by HUD, the federal department directly charged with implementing the Housing Act.

The HUD regulations implementing § 6(*l*)(6) at the time this action arose were promulgated in a final rule, entitled "Public Housing Lease and Grievance Procedures," published October 11, 1991. 56 Fed. Reg. 51,560. The applicable portions of the regulations, codified at 24 C.F.R. §§ 966.4(f)(12) and 966.4(*l*)(2)(ii) (2001), closely follow the statutory language. (App. 5a). The preamble to the 1991 rule, which is set forth in pertinent part in the Appendix (App. 1a-4a), makes it clear that HUD did not interpret the statute as containing an innocent tenant defense. To the contrary, the preamble states unequivocally that the tenant's obligation to assure that household members and guests do not engage in criminal activity is a direct contractual obligation, not the imposition of vicarious liability.

> The statute and regulation are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member.

56 Fed. Reg. 51,567 (Oct. 11, 1991).

In the preamble, HUD noted but rejected suggestions by legal aid and tenants' organizations that tenants "should not be required to 'assure' the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household." HUD also disregarded comments urging that:

> the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant had done everything "reasonable" to control the criminal activity. 56 Fed. Reg. 51,566 (Oct. 11, 1991).

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that, unless Congress has expressed a clear intent to the contrary, the interpretation of a statute by an agency charged with enforcing it must be upheld if it is a permissible construction of the statute. Where Congress has not spoken directly to "the precise question at issue" the court "does not simply impose its own construction on the statute." *Id.* at 843.

> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . "The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

Id. (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).[33]

The court below avoided the deference to HUD regulations that *Chevron* requires, by concluding that "Congress had an intention on the precise question at issue that is contrary to HUD's construction . . . ." *Rucker*, 237 F.3d at 1119. In light of the entire legislative record discussed *supra*, however, such a conclusion seems almost preposterous. At worst, § 6(*l*)(6) is

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[33] Nor is there any question that the full deference required by *Chevron* is mandated, since HUD's interpretation was promulgated in a formal notice and comment rulemaking process pursuant to statutory rulemaking authority. *See United States v. Mead Corp.*, 533 U.S. 218 (2001) (discussing lesser deference accorded to agency interpretations developed without notice and comment rulemaking).

silent concerning an innocent tenant defense. In such a circumstance, HUD's interpretation must control, unless the statutory language simply does not support that interpretation.[34]

In *Chevron*, the Court indicated that the applicable standard for determining whether a regulation is "permissible" depends upon whether there was an express or implied delegation to the agency. *Chevron*, 467 U.S. at 843-44. In the former case, "the agency's regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.* In the latter case, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*[35] In view of the plain meaning of the statutory language, the acknowledged seriousness of the drug and crime problems in public housing, the well-reasoned explanation of HUD's interpretation of § 6(*l*)(6) as set forth in the 1991 rule preamble (App. 1a-4a), and the weight of evidence indicative of legislative intent supporting HUD's interpretation of the statute, the applicable HUD regulations easily satisfy either of these tests.[36] HUD has acted rationally and reasonably in its

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[34] "The court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question had initially arisen in a judicial proceeding." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (quoting *Chevron*, 467 U.S. at 843, n 11).

[35] What constitutes a "permissible" construction has been variously defined. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (a "permissible" construction of a statute is one that is "rational and consistent with the statute").

[36] The language of 42 U.S.C. 1437d(c)(4)(A)(iii), as it existed when this action arose, also supports HUD's interpretation that § 6(*l*)(6) does not contain an innocent tenant defense. That section, which imposed certain mandatory preferences for admission to public housing, contained an exception for "any individual or family evicted by reason of drug-related criminal activity." However, it allowed the HUD Secretary to waive this disallowance of preference for "any member of a family of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity...."

regulations. The principles of *Chevron* thus demand reversal of the decision under review.[37]

IV. THE INTERPRETATION OF § 6(*l*)(6) BY THE COURT BELOW MISCONCEIVES THE NATURE OF STATE LAWS UNDER WHICH PUBLIC HOUSING EVICTIONS PROCEED

The Ninth Circuit's interpretation of § 6(*l*)(6) also misconceives the substance of state laws under which public housing evictions occur. The court was troubled that "[a]lthough the statute permits 'termination of tenancy,' it does not answer the question of *whose* tenancy." *Rucker*, 237 F.3d at 1120. In situations with multiple tenants, the court asked, did the statute authorize eviction of the offending party only, or of all persons on the lease? *Id.* Congress has, in § 6(*l*) of the Housing Act, enacted certain special requirements for public housing leases, but it has never elected to create a federal landlord and tenant law for eviction (dispossessory) proceedings. Thus, although public housing evictions involve administrative notice and grievance procedures specified in federal regulations, virtually all such evictions, like those in the case under review, proceed judicially under state unlawful detainer statutes or landlord-tenant acts. Under these statutes the question of "whose tenancy" is irrelevant because the action is for *possession of the real property* not the ejection of specific household members. Indeed, the removal of particular persons from leasehold premises is not a remedy available under these

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The provision would be meaningless if innocent tenant evictions were not permitted. (Congress repealed the mandatory preferences, and with them this provision, in 1998.)

[37] The United States Court of Appeals, Eleventh Circuit, agrees with HUD and the *amici curiae* that § 6(*l*)(6) does not contain an innocent tenant defense and that HUD's interpretation of the statute is controlling. On November 7, 2001, a three-judge panel of that court ruled *inter alia*; "Because we find the statute to be clear on its face, HUD's interpretation is the only permissible construction of the statute." *Burton v. Tampa Hous. Auth.*, No. 00-13607, 2001 U.S. App. LEXIS 24043 (11th Cir. Nov. 7, 2001).

statutes.[38] This common characteristic of state landlord-tenant and unlawful detainer statutes - most of which have been in existence for many decades - must be presumed to have been known to Congress as it considered matters involving evictions from public housing.

V. THE DECISION OF THE COURT BELOW IGNORES THE PRACTICAL REALITIES SURROUNDING EFFORTS BY PHAs TO CONTROL ILLEGAL DRUGS AND CRIME IN PUBLIC HOUSING DEVELOPMENTS

The Ninth Circuit's decision ignores the realities associated with enforcement of PHA policies for the control of illegal drugs and crime in public housing developments. The decision under review would, where the criminal activity occurs outside the unit, require a showing that the perpetrator is under the tenant's control with respect to the commission of the offense, or that the tenant participated in or had prior knowledge of the offense. Such a showing will generally be possible only in the limited, and highly unlikely, circumstance in which the tenant is caught in the act of observing an offending household member or guest commit the offense.[39]

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[38] The overwhelming majority of state landlord tenant and unlawful detainer laws contemplate only actions for recovery of possession of the real property. In a survey of the state landlord tenant and unlawful detainer statutes, *amici curiae* found only one, the Oklahoma landlord and tenant law, which provides for the eviction of individual occupants. OKLA. STAT. tit. 41, § 117 (2000). The laws of some states adopting variants of the Uniform Residential Landlord and Tenant Act contain a general right on the part of landlords to injunctive relief to enforce rights. Because of the burden that must be carried by a party seeking such relief, however, this remedy cannot be considered practicable. Pennsylvania has adopted the Model Expedited Eviction of Drug Traffickers Act, which permits partial evictions, although the state's landlord and tenant law does not permit them. *Amici curiae* noted that at least three states - Illinois, North Carolina and Tennessee - have statutes that specifically address eviction for criminal activity or conviction; however, none of these contemplate partial evictions.

[39] The HUD regulations in effect at the time this action arose (App. 5a) implicitly assume that the requirement for "control" applies only to "other persons" and not to household members or guests. The current regulations, promulgated in the May 24, 2001 final rule, to be codified at 24 C.F.R. § 5.100, make this distinction explicit. They define *other person under the tenant's control*, for purposes of the Part 966 Public Housing Lease and Grievance regulations and certain other regulations, as a person who, although not staying in the unit as a guest, is present on the premises [the unit or development] "because of an invitation from the tenant or another member of the household who has express or implied authority to so consent on behalf of the tenant." The definition goes on to state that a person "temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control." HUD's determination concerning the meaning of the word "control" is entitled to *Chevron* deference. 66 Fed. Reg. 28,791 (May 24, 2001).

Whether a tenant has knowledge or control with respect to a particular incident of criminal activity committed by a household member or guest is usually known only to the tenant. PHAs have no power to conduct in-unit surveillance or custodial interrogations. Proof of a tenant's knowledge or participation in any situation where the tenant is not physically present at the time of the offense will generally be impossible from a practical standpoint. Similarly, a PHA has little or no means practically available to it to rebut self-serving declarations that a tenant had imposed strict household rules forbidding drug use or other criminal behaviors, and, absent a pattern of criminal activity that results in a documented record, the PHA usually has no available means to proving by inference that the criminal act of a household member was foreseeable. Even where a court recognizes a rebuttable presumption of the tenant's knowledge or control, the PHA will generally not possess effective means to refute statements of tenants and other household members denying knowledge or control. The usefulness of such a presumption, in arriving at the truth, is thus largely illusory.

As mentioned *supra*, the HUD regulations require no such proofs because they are based on a more practical contractual standard. This approach is the only one that is practicable. Judicial refusal to recognize that the obligations of the tenant are contractual virtually guarantees that crime and drugs will be out of control in many public housing

developments.[40]

The imposition of an innocent tenant defense in public housing is also especially problematical because of the character of public housing leases. Public housing leases differ fundamentally from private sector residential leases because they are "endless." The Housing Act provides that, so long as tenant families have complied with applicable community service requirements, their public housing leases are automatically renewed. 42 U.S.C. §1437d(*l*)(1). Public housing leases thus continue indefinitely, terminating only for a breach of the lease as described in § 6(*l*) of the Housing Act.

The automatic renewal of public housing leases renders unavailable to providers of public housing the most efficient remedy for ridding private sector residential developments of anti-social or otherwise undesirable tenant families - that of simple nonrenewal of lease. The federal regulatory regime thus impels public housing agencies to resort to eviction, or the credible threat of it, as the principal means of removing criminal elements from their developments. Ironically, private sector housing providers, who least need the remedy of eviction, do not usually face an innocent tenant defense. *Rucker dissent*, 237 F.3d at 1137. Yet, if the ruling below stands, public housing agencies will be subject to such a defense, in spite of the fact that a tenant's right of continued occupancy under the "endless lease" leaves PHAs with little choice but to evict, or credibly to threaten eviction, if they are to control illegal drugs and crime in their developments. Considering the serious illegal drug and crime problems plaguing many public housing developments, removal of the PHA's ability to evict the entire household is destructive to safe public housing

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[40] Eviction of families for the actions of a household member or guest is a significant tool used by PHAs to reduce crime and drug activity in public housing projects. In a survey of PHADA members, 204 PHAs responded, primarily small PHAs (average number of public housing units of respondents was 381), and indicated that from 1998, 1735 evictions involving the acts of household members and guests occurred.

environments.[41]

Finally, the credible threat of eviction is vital to the ability of PHAs to persuade tenants to agree to the removal and bar of offending household members or guests in lieu of eviction. This action is in many cases the only practicable alternative to evicting the entire household.[42] Although HUD regulations allow PHAs to condition continued occupancy on the exclusion of a household member who has "participated in or been culpable for action or failure to act that warrants termination"[43] refusal of the tenant to agree to removal and bar is not a ground for termination of tenancy explicitly authorized in the Housing Act.[44] Thus, as a practical matter, the use of removal and bar is dependent upon the tenant's agreement, motivated by the perception that the PHA has the authority to

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[41] Each instance in which a person engaging in criminal activity remains in public housing reduces in some measure the ability of the PHA to fulfill its promise to provide safe and secure housing. Recent experience with crime control in inner city environments has included an emphasis on eliminating the appearance of crime, including so-called "life-style crime" that may give both law-abiding persons and criminals impressions that the neighborhood is out of control. This is sometimes referred to as the "Broken Windows" theory of law enforcement. *See* WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (Random House N.Y. 1998) 138-39, 152, 228 *et seq*. Indeed, evidence that uncontrolled social environments can and have resulted in the complete failure of public housing developments is seen in the widely reported decisions to abandon and demolish public housing projects in Chicago and other cities.

[42] A survey of its members by *amicus curiae*, CLPHA, revealed that 19 of 21 agencies responding to the inquiry (90.5%) stated that they employed removal and barring of individual household members or guests as a measure short of eviction. (One of the respondents barred only guests.) Respondents represented approximately 91,700 units of public housing.

[43] 66 Fed. Reg. 28,803 (May 24, 2001) (to be codified at 24 C.F.R. § 966.4(*l*)(5)(vii)(C)). At the time this action arose, the regulation contained different language to the same effect in 24 C.F.R. § 966.4(*l*)(5) (App. 6a).

[44] The enforceability of lease provisions calling for removal and bar of household members, where such provisions exist, is presently unclear.

evict the entire household unless the removal and bar is accepted. Voluntary agreement on the tenant's part is necessary for the additional reason, noted *supra*, that state unlawful detainer statutes do not generally contemplate or allow an action to remove individual household members. A tenant who is aware that the court will not evict the entire household will not feel compelled to cooperate with the PHA in removing and barring household members and guests who engage in criminal activity. The decision of the Ninth Circuit, if sustained, will render illusory the useful remedy of removal and bar as an alternative to eviction.

VI. IMPOSING RESPONSIBILITY ON THE TENANT FOR ASSURING THAT MEMBERS OF THE HOUSEHOLD AND GUESTS WILL NOT ENGAGE IN CRIMINAL ACTIVITY IS NOT UNREASONABLE OR "ODD AND ABSURD."

In enacting Housing Act § 6(*l*), Congress conferred upon the PHAs the authority, but not the obligation, to terminate public housing tenancies upon occurrence of a lease default allowed under the statute.[45] Given that a lease violation has occurred, whether or not action will be taken to evict rests within the discretion of the PHA. Even where, as here, an unlawful detainer action has been filed, it is the PHA that determines whether to pursue it or to settle with an accommodation in lieu of eviction. HUD's 1991 lease and grievance regulations, as codified at 24 C.F.R. § 966.4(*l*)(5) (2001) (App. 6a), and its recent regulations implementing the post-1990 legislation affecting termination of public housing tenancies both reflect this discretionary authority.[46] It is clear that the discretion to which HUD's regulations refer resides with

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[45] Section 6(*l*)(6) does not require a PHA to evict. It only requires public housing leases to provide that certain behaviors on the part of a tenant, any member of tenant's household, a guest or other person under the tenant's control *shall be cause for* eviction. 42 U.S.C. § 1437d(*l*)(6).

[46] HUD's final rule entitled "Screening and Eviction in Public and Assisted Housing," published May 24, 2001 redesignated and restated this section, without substantive change. 66 Fed. Reg. 28,803 (May 24, 2001). The new language is set forth in full in the Appendix (App. 7a-8a).

the PHA, not the reviewing court.[47]

Notwithstanding the public rhetoric of the One-Strike and You're Out Initiative, PHAs are not, and have never been, required to evict in every instance where a lease may be violated. In responding to a comment addressing the nature of PHA discretion in the preamble to its May 24, 2001 final rule, HUD stated, in pertinent part, as follows:

> [I]nsofar as PHAs possess discretion to determine for themselves when to initiate eviction proceedings, they are neither required by law nor encouraged by HUD to terminate leaseholds in every circumstance in which the lease would give the PHA grounds to do so...[T]hese points are already inherent in the regulatory language.[48]

In this respect, the Ninth Circuit, whose opinion is overtly reactive to the federal One-Strike Initiative,[49] misunderstood the policy. While One-Strike did mandate PHA policies requiring the exclusion of certain *applicants*, it effectuated no substantive legal change regarding PHA discretion in terminating

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[47] *See Minneapolis Public Hous. Auth. v. Lor*, 591 N.W.2d 700 (Minn. 1999) The discretionary decision of the PHA should thus not be disturbed unless arbitrary, capricious, unsupported by substantial evidence, or abusive to such an extent as to amount to an error of law. *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996).

[48] 66 Fed. Reg. 28,783 (May 24, 2001).

[49] In the preamble to its opinion, the court described the policy as one "which encourages evictions regardless of circumstances" and, in describing the facts, began by stating that "[b]ecause of the increased enforcement under the 'One-Strike' policy, we are now beginning to see exactly how far-reaching HUD's interpretation of § 1437d(*l*)(6) can be." *Rucker*, 237 F.3d at 1117.

established tenancies.[50]

PHA discretion is important because it bears upon the issue of fairness. Courts construing § 6(*l*)(6) as containing an innocent tenant defense have sought to assure fairness categorically by limiting the range of discretion otherwise residing with the PHAs under the regulatory scheme. *Amici curiae* urge, however, that it is the PHAs that are best situated to make decisions concerning the appropriateness of eviction in individual cases. It is they who are charged by the federal government with the responsibility for maintaining safe public housing environments, and it is they who are accountable to their residents and local government officials if they fail to do so. Moreover, achieving "fairness" is a matter of considerable complexity. The decision whether to evict often involves an array of factors affecting not only the family but the entire community of public housing residents. A PHA might, for example, legitimately consider the severity and trending of crime problems in the tenant's development, the effect the decision will have as precedent for other residents, the perceptions of residents concerning safety and security, or the potential for intimidation of others by household members or guests involved in criminal activity. Sometimes the decision will involve questions of judgment to which there is no clear answer, such as the likelihood that a family member who is removed and barred (in lieu of evicting the entire household) will return. Only some of the myriad factors potentially affecting a decision to evict have to do with fairness to the individual tenant, and among these, only some are properly considered by a court hearing an unlawful detainer case. Such a court will generally have no knowledge, for example, of the family's record of past behavior with the PHA except where the

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[50] The HUD pamphlet promulgating the One-Strike Initiative in 1996 itself made clear that, while HUD urged PHAs to consider strict lease provisions providing for zero tolerance regarding drugs and crime, the election when and where to enforce those provisions in particular cases remained within the discretion of the PHAs. *"One Strike and You're Out" Policy in Public Housing*, 7-8 (March 1996) transmitted by HUD Notice PIH 96-16 (April 12, 1996).

ground for eviction is that of repeated lease violation.

Judicial focus in public housing evictions solely or primarily upon the perceived hardship to individual defendants represents an incomplete view of the equities involved. Refusal to allow the removal of an entire household ignores the disastrous effect that drug-related and serious violent criminal behavior has upon other public housing residents. It also ignores the reality that the retention of a family in public housing whose members commit crimes has the likely effect of excluding another equally needy, noncriminal family on the waiting list[51] whose unmet housing needs do not differ from those of the household that is evicted for criminal activity.[52] If evicted, an innocent tenant will face a situation no worse than that of the next family on the waiting list.[53]

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[51] During debate in the House on H.R. 5210, the ranking minority member of the Subcommittee on Housing and Community Development, Rep. Marge Roukema, stated:

> At a time when we have long waiting lists of law-abiding citizens who hope to receive housing assistance, it makes no sense to allow even a single unit of assisted housing to be occupied by a criminal who preys on others in housing projects and their neighborhoods. It's a tough approach, but one which sends a clear message that "There is a cost to using drugs."

134 Cong. Rec. 22,630 (Sept. 7, 1988).

[52] The recent emphasis on background screening in admissions to public housing to eliminate households with members having unsavory backgrounds presumably makes it less likely that the next family to occupy the unit will engage in criminal activity. To assist in this process, Congress enacted legislation in 1996 granting to PHAs the right to obtain criminal background information on applicants for public housing. *See* Housing Opportunity Program Extension Act, § 9(b), note 6 *supra*. In 1998, it also mandated the exclusion of any household with a member who is an active user of illegal drugs or a person with a pattern of alcohol abuse that may threaten others. *See* QHWRA, § 576(b), note 32 *supra*.

[53] Advocates and some courts have seen hardship in what they perceive as a certainty that households evicted from public housing will become "homeless." HUD has no data that confirm or deny this assertion, although

Finally, the innocent tenant is not more innocent than a household member, often a minor or elderly member of the household, who is evicted because the *tenant* himself or herself has engaged in criminal behavior. Yet in these instances, no question is raised concerning the propriety of removing the entire family.

As the dissent in the court below acknowledged, unlike federal benefit programs such as Food Stamps, federal housing benefits have never been an "entitlement" under which all income-eligible persons have a right to housing assistance. To the contrary, it has been estimated that, nationwide, the assistance available under federal housing assistance programs is sufficient to serve only *25 percent* of the persons who are eligible for such assistance.[54] The scarce resource that is public housing ought to be reserved for families whose members do not engage in crimes.

Congress and HUD have reasonably determined that, ultimately, someone must be responsible for the criminal behavior of household members and guests, and that someone must be the person responsible for introducing those engaging in criminal misconduct to the public housing community. The Ninth Circuit should not have substituted its views for those clearly expressed by the coordinate branches of government.

CONCLUSION

The decision of the Ninth Circuit under review should be reversed.

November 20, 2001

PHAs report anecdotally that true homelessness, in the sense that the family is forced to reside in the streets, is not a common consequence of public housing evictions.

[54] Kingsley, *Federal Housing Assistance and Welfare Reform: Uncharted Territory*, The Urban Institute, New Federalism - Issues and Options for States, Series A, No. A-19 (Dec. 1997) at 2.

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APPENDIX

APPENDIX

Excerpt, HUD 1991 Public Housing Lease and Grievance Rule Preamble (56 Fed. Reg. 51,566-67)

3.3 *Eviction For Criminal Activity*

3.3.1 Crime By Household Member

Federal law provides that certain categories of criminal activity by a public housing household member are grounds for eviction. A PHA must: "utilize leases which-... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, *engaged in by ... any member of the tenant's household* ... shall be cause for termination of tenancy ..." (U.S.H. Act, sec. 6(1)(5). 42 U.S.C. 1437d(1)(5)) {emphasis supplied}.

The U.S.H. Act statutory prohibition of criminal activity by a public housing household member was originally enacted in the Anti-Drug Abuse Act of 1988 (section 5101. Pub. L. 100-690. November 18, 1988), and was retained in the 1990 NAHA amendments which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S.H. Act). The proposed and final rule provide that the tenant must assure that members of the household (or guests, or other persons under the tenant's control) do not engage in proscribed criminal activity (§ 966.4(f)(12)(i)).

Comment by legal aid and by tenant organizations asserts that the tenant should not be required to "assure" the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by members of the household. Comment proposes various

possible standards to determine whether the tenant can be evicted for criminal behavior by household members. Comment alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything "reasonable" to control the criminal activity. Comment states that under the Constitution a tenant can only be held responsible for activity of a household member within the tenant's control.

PHA comment states that the PHA must be given discretion to evict an entire family for actions of a family member if eviction is in the best interest of other residents. If a PHA lacks clear authority to evict, the PHA may not be able to convince the family to oust a person who engages in criminal activity from the unit.

As in conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease, including obligations concerning the conduct of household members affecting the unit, the management of the housing or the welfare of other residents. By signing the lease, a tenant agrees to comply with leasehold requirements pertaining to the behavior of family members. The ability of a PHA or other landlord to enforce covenants relating to acts of unit residents (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal, or other harmful or disruptive behavior, by unit occupants, the landlord can evict - removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the

continued presence of the tenant and household may result in harm to the housing or other residents, and the spread of such behavior.

The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents, warranting special mention in the law. (U.S.H. Act section 6(1)(5). 42 U.S.C. 1437d(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction). The legislative determination by the Congress rests on a reasonable judgement that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general, and will support the effective management of the housing. Since this judgement is reasonable, and promotes a legitimate public purpose, the legislation is Constitutional under the normal equal protection standard.

There is no reason of Constitutional necessity or public policy for HUD to impose - as proposed by comment - any additional restriction on when the tenancy may be terminated for criminal activity by a household member.

First, as we have already remarked, contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Second, if household member criminal activity is

ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant's right to continued occupancy by the family. The standards proposed by some of the public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Third, in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent, crime by a household member. In practice, the tenant may have encouraged or profited from the criminal activity or may have ignored or turned a blind eye. The statute and regulations are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member. (If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.)

Finally, a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.

24 CFR §§ 966.4((f)(12) and 966.4(*l*)(2)(ii)
(1991 Public Housing Lease and Grievance Rule)

(f) The Lease shall provide that the tenant shall be obligated...
(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
(A) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
(B) Any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(2) *Grounds for termination...*
(ii) Either of the following types of criminal activity by the tenant, any member of the household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents.
(B) Any drug-related criminal activity on or near such premises.

24 CFR § 966.4(*l*)(5)
(1991 Public Housing Lease and Grievance Rule)

Eviction for criminal activity - (i) PHA discretion to consider circumstances. In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit....

Excerpt, 24 CFR §966.4(f)&(l)
(As revised by May 24, 2001 Final Rule, Screening and Eviction in Public and Assisted Housing)

(f) *Tenant's obligations*. The lease shall provide that the tenant shall be obligated...
(12)(i) To assure that no tenant, member of the tenant's household, or guest engages in:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or
(B) Any drug-related criminal activity on or off the premises;
(ii) To assure that no other person under the tenant's control engages in :
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents, or
(B) Any drug-related criminal activity on or off the premises;
(iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

(*l*) *Termination of tenancy and eviction...*
(2) *Grounds for termination of tenancy.* The PHA may terminate the tenancy only for...
(ii) Other good cause. Other good cause includes, but is not limited to, the following:
(A) Criminal activity or alcohol abuse as provided in paragraph (*l*)(5) of this section...

(5) *PHA termination of tenancy for criminal activity or alcohol abuse.*

(i) *Evicting drug criminals.* (A) *Methamphetamine conviction....*

(B) *Drug crime on or off the premises.* The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

(ii) *Evicting other criminals.* (A) *Threat to other residents.* The lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

Excerpt, H.R. Rep. 101-943, Cranston Gonzalez National Affordable Housing Act, Conf. Rep. to accompany S-566, October 25, 1990 at 418.

Lease requirements: The Senate bill contained a provision not included in the House amendment that amends the prohibited activities under the lease to prohibit criminal activity that adversely affects the health, safety, and right to quiet enjoyment of the premises by other tenants and including drug-related criminal activity, that threatens the health or safety of, or right to quiet enjoyment of the premises by other tenants. The conference report contains the Senate provision, amended to read that each public housing agency shall utilize leases which provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any quest (*sic*) or other person under the tenant's control shall be cause for termination of tenancy.